Supreme Court, U.S.
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No. 06-61

In The

Supreme Court of the United States

HECLA MINING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA
AND THE STATE OF IDAHO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 60(b)(5) authorizes a district court to grant relief from a judgment on grounds that it is no longer equitable for the judgment to have prospective application. Did the Ninth Circuit impermissibly limit the district court's authority to administer its consent decrees in concluding, based on *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), that this Court intends for such relief to be governed by a limited checklist of factors to the exclusion of other considerations, with the admissible evidence defined by the "four corners" of the decree, like a contract?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

In addition to the parties named on the caption, ASARCO Incorporated ("Asarco") was a party to the proceedings at the United States District Court for the District of Idaho and the Ninth Circuit Court of Appeals. Asarco filed a petition for relief under Chapter 11 of the Bankruptcy Code on August 9, 2005 in the United States Bankruptcy Court in the Southern District of Texas. Asarco has not joined in this petition.

Coeur d'Alene Mines Corporation, Callahan Mining Corporation, Sunshine Precious Metals, and Sunshine Mining Company, were parties to the consent decree which is central to this petition. These parties have not joined in this petition, or any of the district court or Ninth Circuit proceedings leading up to this petition.

Hecla Mining Company has no parent corporation. As of March 2006, Royce & Associates, LLC, investment advisor to The Royce Funds under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.*, held 10.8% of the common shares of Petitioner. No other person or entity owns 10% or more of Petitioner's common stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hecla Mining Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit, dated December 5, 2005, is published at 430 F.3d 972, App. 1a. The orders of the United States District Court for the District of Idaho in this case are not published, App. 23a-55a. Petitioner, Hecla Mining Company ("Hecla"), seeks review of the decision of the court of appeals on a writ of certiorari.

JURISDICTION

On January 18, 2006, Hecla timely filed a petition for rehearing or rehearing en banc in the court of appeals. On April 12, 2006, the court of appeals filed an order denying both, App. 56a. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of a federal court of appeals on a writ of certiorari.

RELEVANT RULES AND STATUTORY PROVISIONS

Federal Rule of Civil Procedure 60(b)(5) and relevant provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), are set forth in the appendix, App. 59a-66a.

STATEMENT OF THE CASE

A. Overview.

This case involves promises made and then broken by the United States. It also involves one of the largest environmental cleanups ever to take place in this country, cutting a wide swath of disruption and impacts across multiple towns and residential neighborhoods in northern Idaho. Soil cleanups like this one present tremendous challenges to federal and state environmental agencies because they necessarily involve a highly intrusive process requiring the destruction, and then the reconstruction, of yards, gardens, school yards and parks, plus extensive face-to-face negotiation with hundreds or, in this case, thousands of property owners and tenants. The exacting on-site details and the intrusiveness of the process, multiplied thousands of times, explains why the United States Environmental Protection Agency, short of friends and supporters in the Coeur d'Alene Basin to begin with,[1] was so anxious that Hecla and the other mining companies,

[1] By way of example, in 2001, then Idaho governor, the Hon. Dirk Kempthorne, demanded that EPA step aside and leave further cleanup to the "good people of Idaho." Testimony of Governor Dirk Kempthorne before a United States Environmental Protection Agency hearing on the Coeur d'Alene Basin Cleanup, November 13, 2001. App. 67a.

undertake the massive soil cleanup contemplated for the Bunker Hill Superfund Site. It also explains why EPA offered significant inducements to Hecla and others to enter into the consent decree in question. The district court found that these inducements were made, that they were reasonably relied upon by Hecla and the other private party signatories, that the United States subsequently reneged on the promises, and that this represented a significant change in the factual circumstances warranting a modification of the consent decree. The Ninth Circuit disagreed and reversed.

B. The Site.

The Bunker Hill Superfund Site ("Site") is one of the oldest and largest Superfund sites in the nation, located in a historic mining district, known as the "Silver Valley," in northern Idaho. *See* Bunker Hill Mining and Metallurgical Complex Operable Unit 3 Record of Decision, September 2002, Figure 1.0-1, Basin Study Area (map showing the Bunker Hill Superfund Site and Coeur d'Alene Basin), App. 75a. The original NPL site, a 21 square mile area known as the "Box," was among the first sites listed on CERCLA's National Priorities List ("NPL") in 1983. The Box is the area maximally impacted by emissions from the historic Bunker Hill smelter complex located in the center of the Box.[2] The area was also impacted by the discharge of "tailings," which are wastes generated from the milling of ore, that historically were carried downstream fluvially

[2] None of the defendant signatories to the consent decree at issue here ever owned or operated the smelter complex. The then owner of the smelter complex filed for bankruptcy in October 1993.

from upstream mining areas proximate to the drainage of the South Fork of the Coeur d'Alene River.

C. The Consent Decree.

The 1994 Consent Decree, which is at the heart of this dispute, was entered by the district court on November 17, 1994, pursuant to its authority and jurisdiction under 42 U.S.C. § 9613(b), and 28 U.S.C. §§ 1331 and 1345. The 1994 Decree was intended to address the cleanup liabilities, under CERCLA and within the original NPL site, of the following defendant signatories: Asarco, Hecla, Coeur d'Alene Mines Corporation, Sunshine Precious Metals and Sunshine Mining Company.[3] Coeur d'Alene Mines' obligation under the consent decree was limited to a one-time cash payment. The remaining companies agreed to undertake EPA's massive soil cleanup program along the river and through the small towns scattered through the Box. The original cost estimate for this work was $40 million. By 2003, when the district court entered final relief on Hecla's motion to modify, the companies had already spent $44.7 million on the program, and estimated an additional $18 million in expenditures to finish the job. *See* District Court Order Granting in Part and Denying in Part Hecla's Request for Final Relief (Nov. 18, 2003), App. 41a, 44a n.3. (*hereinafter*, November 2003 Order). When the program is complete, over 2,500 residential yards, plus many other

[3] The then extant Sunshine Mining corporate interests filed for bankruptcy on August 23, 2000. Sunshine Mining's liabilities under the 1994 Consent Decree, and in the Coeur d'Alene Basin more generally, were resolved by the district court's approval, by order dated January 22, 2001, of a consent decree among the United States, the Coeur d'Alene Tribe, and the various Sunshine Mining entities, resolving all of Sunshine's outstanding Box and Basin liabilities.

non-residential properties, will have been remediated. Not surprisingly, given its breadth and cost, the program has had a significant impact on the Silver Valley's social and economic fabric.

By 2003, when the district court issued its final ruling, it had been administering the 1994 Consent Decree for almost a decade.[4] The district court also was well aware of the many bankruptcies, and other circumstances, that were shrinking the already small pool of potentially responsible parties in a position to help fund Superfund cleanup at the Site. *See* notes 2 & 3, *supra*; note 8, *infra*; District Court Order Granting in Part and Denying in Part Hecla's and Asarco, Inc.'s Motions to Modify Consent Decree (Sept. 30, 2001), App. 31a (*hereinafter*, September 30, 2001 Order).

A key inducement for both Hecla and Asarco in entering into the 1994 Consent Decree was the United States' repeated assurances not to expand the NPL listing beyond the already huge, 21-square mile Box. In 1991, for example, then EPA Regional Administrator Dana Rasmussen wrote to the Idaho Congressman Larry LaRocco:

> Let me state unequivocally that is *not* EPA's intention to expand the boundaries of the site. We recognize that there are many other regulatory

[4] The Honorable Judge Harold L. Ryan entered the consent decree and presided over its initial administration. Judge Ryan passed away in April 1995. The Honorable Judge Edward J. Lodge took over further administration of the consent decree from the Hon. B. Lynn Winmill in February 2001. Judge Lodge, continues to preside over Bunker Hill related matters, as described herein.

> tools besides Superfund legislation to affect environmental improvements.[5]

November 7, 1991 Letter from United States Environmental Protection Agency Regional Administrator Dana A. Rasmussen to Idaho Congressman Larry LaRocco, App. 76a. (emphasis in original). As the district court found, this and similar assurances were an essential "trade off," on which the companies reasonably relied to determine "how far their dollars would reach and what could be done to keep the company afloat." September 30, 2001 Order, App. 29a.

D. Site Expansion.

In March 1996, eighteen months after entry of the 1994 Consent Decree, the United States did an about face, reneged on its assurances not to expand the Site, and filed a major lawsuit in federal court in Idaho seeking to recover millions, if not billions of dollars in response costs and natural resource damages for alleged hazardous substance releases throughout the Coeur d'Alene Basin. *See* March 22, 1996 Press Release from the United States Department of Justice, App. 78a. The new Superfund Site boundaries embraced the entire Coeur d'Alene drainage,

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[5] The parties to the consent decree recognized that EPA might utilize Superfund authorities to a limited degree as part of the multi-media cleanup initiative envisioned by the consent decree. *See* September 30, 2001 Order, App. 27a-28a & n.1. None of the parties anticipated that the multi-media cleanup initiative would fail. *Id.* The 1994 consent decree does not specifically incorporate EPA's assurances and expectations on this issue. However, the definition of the "Site" is limited to the Box. Plus, EPA did not reserve to itself anywhere in the consent decree the authority to expand the Bunker Hill NPL Site. *See infra* at page 16.

from the Idaho-Montana border on the East, through Idaho and then on into Washington, down the drainage of the Spokane River, west of the City of Spokane – an enormous area covering thousands of square miles. *See also United States v. ASARCO, Inc.*, 214 F.3d 1104 (9th Cir. 2000). Any question about the United States' intent to "Superfund" the Basin and expand the NPL site was answered unequivocally by EPA's announcement in early 1998 of its undertaking a full-blown Superfund cleanup study for the entire Basin.[6] *See* September 30, 2001 Order, App. 30a-31a & n.2.

The 1996 Basin lawsuit, the so-called "Basin Case," was assigned to Judge Lodge. In early motion practice in 1998, involving a statute of limitations question, Judge Lodge addressed the site expansion issue for the first time, finding that, in fact, EPA had impermissibly expanded the Bunker Hill NPL Site from the 21-square mile Box, to include the entire Basin. *United States v. ASARCO, Inc.*, 28 F. Supp. 2d 1170, 1180-81 (D. Idaho 1998).[7]

Trial of the liability phase of the Basin case took place over a six-month period in 2000. Judge Lodge heard testimony from close to 100 witnesses during more than 78 days of trial and reviewed 8,695 exhibits. The trial transcript

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[6] EPA claims approximately $60 million in CERCLA study and other costs in the Basin as of August 30, 2003. The Department of Justice claims an additional $16.7 million in litigation costs as of September 30, 2003.

[7] The Ninth Circuit reversed, finding as a matter of law that the expansion was permissible under the Administrative Procedure Act. *United States v. ASARCO, Inc.*, 214 F.3d 1104 (9th Cir. 2000). The Ninth Circuit did not, however, question Judge Lodge's factual findings on the United States' about-face decision to Superfund the Basin and expand the Site.

runs to over 16,000 pages. In September 2003, Judge Lodge issued an order assigning substantial liability to Hecla and Asarco for at least some parts of EPA's claims. *Coeur d'Alene Tribe v. ASARCO, Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003). The extent of that liability, and the companies' liability for natural resource damages, plus certain defenses, were left to a Phase II Basin case trial that has yet to occur.[8]

E. The Motion to Modify.

On January 16, 2001, Hecla filed a motion pursuant to the 1994 Consent Decree, ¶ 114 (App. 91a), and Federal Rule of Civil Procedure 60(b), to modify the 1994 Consent Decree, in light of the changed circumstances associated with the expansion of the Bunker Hill NPL Site. Rule 60(b) of the Federal Rules of Civil Procedure authorizes a federal district court to modify a consent decree finalized and entered by the court if, among other reasons, "it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5).

Judge Lodge held a two-day evidentiary hearing on the motion in mid-September 2001 and issued an initial ruling 11 days later, on September 30, 2001. This was after completion of the Phase I Basin case trial, but before issuance of his written, September 2003 Basin case order.

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[8] The Court's September 3, 2001 Order set a Phase II trial date of May 11, 2004. That date was rescheduled several times before Judge Lodge vacated the Phase II trial altogether, pending resolution, now that Asarco is in bankruptcy, of the issues of the applicability of the automatic stay and the Idaho District Court's jurisdiction at this point to try the Phase II case as to Asarco. Asarco filed for bankruptcy protection on August 9, 2005.

Judge Lodge held that modification of the 1994 Consent Decree was warranted under Federal Rule of Civil Procedure 60(b)(5) and this Court's decision in *Rufo v. Inmates of Suffolk County*, 502 U.S. 367 (1992). The district court found, based on extensive testimony and written evidence, that expansion of the Bunker Hill NPL Site constituted "a significant change in factual circumstances and these changes were not reasonably anticipated by the Defendants at the time the Consent Decree was signed." September 30, 2001 Order, App. 30a.

The district court next addressed whether this change in circumstances had, under *Rufo*, made compliance with the 1994 Consent Decree "substantially more onerous." "Based on the Court's familiarity with EPA's plans for the Basin," explained Judge Lodge, "the Court believes the overall liability under the RI/FS for the area outside the Box will be substantial." September 30, 2001 Order, App. 32a. The court deferred a final decision on how onerous the change in circumstance might be, and the appropriate relief, until after EPA completed its RI/FS and issued its remedy determination.

The EPA issued its remedy determination, known as a "Record of Decision" or "ROD," in September 2002. The ROD calls for a $360 million cleanup in the Basin. In November 2003, Judge Lodge issued his final decision on Hecla's motion to modify, finding that "the Defendants . . . now also have significant and real liability for the cleanup and restoration of the Basin." November 18, 2003 Order, App. 41a. The court then reduced the companies' remaining obligations under the consent decree by approximately twenty percent (20%) or $7 million dollars. November 18, 2003 Order, App. 44a & n.3. By order dated April 16, 2004, the district court approved the parties'

agreed upon crediting of the $7 million, subject to rights of appeal. *See* District Court Order Granting the Joint Recommendation of the Parties to Modify the Consent Decree (Apr. 16, 2004), App. 51a-53a.

The United States appealed the November 18, 2003 Order and the April 16, 2004 Order to t .e Ninth Circuit. The two appeals were consolidated. The United States claimed that the district court had abused its discretion in finding that the expansion of the Superfund Site was an unanticipated change in circumstances that had made compliance with the 1994 Consent Decree substantially more onerous. The United States also complained that the $7 million credit was not suitably tailored to the changed circumstances found by the district court.

The Ninth Circuit agreed with the United States and reversed the district court's decision. The Ninth Circuit held that a district court's authority in equity to modify a consent decree under Rule 60(b)(5) is limited by contract principles and whether the changed circumstance at issue was anticipated in the contract.[9] *See* Court of Appeals Opinion, *United States of America v. ASARCO, Inc.*, App. 13a-15a. The Ninth Circuit also found that, even if the district court was allowed to consider extrinsic evidence, the evidence was conflicting, and therefore, not sufficient, in the Ninth Circuit's view, to support modification of the 1994 Consent Decree. *Id.*, App. 19a-20a. Based on its reading of *Rufo*, the Ninth Circuit also raised a new issue as to whether the companies had made a reasonable effort

[9] The Ninth Circuit found that the 1994 Consent Decree did anticipate site expansion. For the reasons noted in note 5, *supra*, Hecla contends that this finding is erroneous.

to comply with the 1994 Consent Decree. This question was not considered by the district court and therefore no evidence on the issue was presented below. Nonetheless, the Ninth Circuit found that the companies had not made a reasonable effort to comply.

The Ninth Circuit denied Hecla's Petition for Rehearing or Rehearing En Banc by Order dated April 12, 2006. This petition follows.

REASONS FOR GRANTING THE WRIT

A. The District Courts Administer Thousands of Long-Lived Consent Decrees and Must Have the Discretion and Flexibility to Modify These Decrees as Circumstances Change.

1. The Ninth Circuit's decision triggers the need for this Court to exercise its supervisory power to ensure the district courts' equitable discretion in the administration of consent decrees.

The district courts have continuing jurisdiction over thousands of consent decrees and judgments involving issues of vital public interest and enormous social and economic impacts, including decrees addressing "institutional reform" (*i.e.*, prison overcrowding, school desegregation, voting and public housing cases are examples), antitrust and other business or trade practices, environmental protection, employment and labor relations, patent and trademark and securities regulation. Such decrees often involve goals the implementation of which may take years to achieve. As a result, these consent decrees often remain in place for extended periods of time. In many

cases, the complexity of the decree, the timeframe for implementation and the fact that circumstances change over time require the district courts to exercise broad discretion to properly and effectively administer and, as necessary, modify these decrees while they remain operative.

The environmental decree at issue in this case is a good example of judicial settlements which are of enormous public significance and likely to require modification during their long lives in order to do justice to the parties and the public. *See supra* at page 1, Overview.

Thanks in no small measure to the knowledge that they may seek appropriate modification if circumstances change, defendants like Hecla have entered into long-lived environmental consent decrees with the United States by the hundreds if not thousands. In most instances, the full nature and extent of the work to be undertaken pursuant to the decree is not known – or even knowable – when the decree is entered. Thus, the defendant must rely upon its ability either to negotiate changes with EPA or to go to the district court for an appropriate modification should circumstances dictate. The Ninth Circuit's decision effectively eliminates this second option and, in so doing, will have a chilling effect on consent decrees as an effective vehicle for maximizing cleanups and, in turn, minimizing litigation.

The voluntary participation by potentially responsible parties ("PRPs") in the cleanup of contaminated sites is critical to the success of both EPA and state remediation programs. EPA has identified 44,000 potentially hazardous waste sites and continues to discover about 500 additional sites per year. EPA places what it considers the most

seriously contaminated sites on the NPL. At the end of fiscal year 2002, there were 1,233 sites on the NPL. *See* U.S. General Accounting Office, *Superfund Program: Current Status and Future Fiscal Challenges* (GAO-03-850, July 31, 2003), App. 93a. According to EPA, PRPs have undertaken the work and funded more than 70 percent of the remedial actions begun at sites other than federal facilities in fiscal years 2000 through 2002. *Id.*, App. 97a. Since the inception of the Superfund program through 2002, PRP commitments have exceeded $20 billion. *Id.*, App. 94a. EPA has repeatedly emphasized its "continued commitment to maximize PRP involvement in financing and conducting cleanups" and that "in the past few years, PRPs have led the majority of new remedial actions, accelerating the pace of Superfund cleanups. Early involvement of PRPs also kept transaction and cleanup costs at a minimum." U.S. Environmental Protection Agency, Office of Emergency and Remedial Response: *Progress Toward Implementing Superfund, Fiscal Year 1998*, App. 102a, 105a.

The language of CERCLA itself reflects Congress' intent to ensure cooperative efforts between EPA and PRPs in cleaning up contamination. Section 122, 42 U.S.C. § 9622, for example, details over multiple pages the importance and key elements of CERCLA settlements. Section 122(d)(1)(A), 42 U.S.C. § 9622(d)(1)(A) provides that agreements between EPA and PRPs under this section "shall be entered in the appropriate United States district court as a consent decree." The importance of these consent decrees, their flexibility and that they can be modified to accommodate changed circumstances were underscored by former Assistant Attorney General of the Environment and Natural Resources Division of the

United States Department of Justice, Lois J. Schiffer, in July 19, 2005 testimony before the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee:[10]

> [S]ettling environmental cases with consent decrees provides far more *flexibility* to the parties in establishing what the state or local government must do to come into compliance with the environmental law. The parties, rather than the court, set the schedule. Each party compromises to come up with a more workable solution than a judge-decided ruling may provide. Moreover, a component of consent decree flexibility is that consent decrees can be modified. While both court-established remedies and consent decrees may be modified, courts may well be more willing to change an order not crafted by the judge. With consent decrees, there are effective tools for dealing with *changed circumstances*, including changed financial circumstances, in a state or local government.

A Review of Federal Consent Decrees, S. Hrg. 109-181, Before the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee, 109th Cong. 97, 100 (2005) (testimony of Lois Schiffer, former Assistant Att'y Gen. of the United States) (emphasis in original), App. 109a.[11]

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[10] Ms. Schiffer's remarks were particularly addressed to the effect of consent decrees on state and local governments, but are equally germane to decrees where the U.S. government settles with private parties.

[11] The consent decree in this case specifically provided: "Nothing in this Decree shall be deemed to alter the Court's powers pursuant to Federal Rules of Civil Procedure 60, or otherwise." Consent Decree, ¶ 114. App. 91a.

Affirming the federal district court's discretion in modifying consent decrees is also critical vis-à-vis this Court's supervisory powers over both the circuit and district courts. If the appellate courts can second-guess the district courts without restraint, consent decree modifications will be routinely appealed by the losing litigant wanting to second-guess the district court's opinion. This will only clog the appellate courts with matters properly left to the district courts' fact finding role and discretion.

The Ninth Circuit's usurpation of the district court's role in determining Rule 60(b)(5) motions is inconsistent with this Court's rulings, as well as decisions of other courts of appeal. It is critical that this Court ensure that the courts of appeal understand the proper relationship between the district courts and the circuit courts with respect to Rule 60(b) motions:

> If the District Court takes into account the relevant considerations [all of which are not likely to suggest the same result][12] and accommodates them in a reasonable way, then the District Court's judgment will not be an abuse of its discretion, regardless of whether an appellate court would have reached the same outcome in the first instance. Cf. *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S.Ct. 1463, 1469, 36 L.Ed.2d 151 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow").

Rufo, 502 U.S. at 394 (Justice O'Connor, concurring).

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[12] In contrast, the Ninth Circuit seized upon the fact that the evidence below was conflicting, as somehow justifying its substituting its view of the facts for the findings of the district court.

Certiorari is therefore appropriate on this matter to ensure the proper administration and supervision of the federal courts.

2. The Supreme Court should settle the issue of the scope and applicability of Rule 60(b)(5) after *Rufo*.

Historically, relief from judgments was available in federal courts through a variety of remedies such as *coram nobis*, *coram vobis*, *audita querela*, or bill of review. *See*, Moore & Rogers, *Federal Relief from Civil Judgments*, 1946, 55 Yale L.J. 623, 659-682. In *United States v. Swift & Co.*, 286 U.S. 106 (1932), this Court recognized "the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent." *Id.* at 114. In that case, however, the motion for modification was denied, the Supreme Court holding: "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." *Id.* at 119. In 1946, Rule 60(b)(5) was promulgated.

In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), this Court construed the district courts' power to modify consent decrees when "it is no longer equitable that the judgment should have prospective application," in accordance with Federal Rule of Civil Procedure 60(b)(5). The Court noted that *Swift* did not represent a hardening of the traditional flexible standard for modification of consent decrees. *Id.* at 379. It went on to state that the "grievous wrong" standard was not intended to take on a "talismanic quality, warding off virtually all efforts to modify consent decrees." *Id.* at 380. Instead, the language

of Rule 60(b)(5) "permits a less stringent, more flexible standard" for relief from a final judgment and allows a court to decide when "it is no longer equitable that the judgment has prospective application." *Id.*

The *Rufo* Court then turned to the case before it, an institutional reform dispute, and outlined a set of principles to be followed by the district courts in determining motions to modify in such cases. According to the Supreme Court, the relevant factors are:

> (1) Whether a significant and unanticipated change in circumstances exists;
>
> (2) Whether the changed circumstances have made compliance with the decree substantially more onerous;
>
> (3) Whether the proposed modification to the decree is suitably tailored to the changed circumstances; and
>
> (4) Even if the changed circumstances were anticipated, whether the movant agreed to the decree in good faith, made reasonable efforts to comply with the decree and it would be inequitable to deny relief.

Id. at 383-385.

These considerations are not a rigid prescription, but rather are to be applied in a flexible manner, within the broad, equitable discretion of the district court. As recognized by the Third Circuit Court of Appeals:

> We believe that the generally applicable rule for modifying a previously issued judgment is that set forth in Rule 60(b)(5), *i.e.*, "that it is no longer equitable that the judgment should have prospective

> application." It would be a mistake to view either *Rufo* or *Swift* as encapsulating a universal formula for deciding when that point has been reached. Instead, each of those cases represents a response to a particular set of circumstances. A court of equity cannot rely on a simple formula but must evaluate a number of potentially competing considerations to determine whether to modify or vacate an injunction entered by consent or otherwise.

Building and Const. Trades v. N.L.R.B., 64 F.3d 880, 888 (3rd Cir. 1995). "[D]ifferent considerations may have greater or lesser prominence in different cases, not because the cases are characterized one way rather than another but because equity demands a flexible response to the unique conditions of each case." *Id.*

In this case, the Ninth Circuit rejected *Rufo*'s flexible discretion standard and reverted to a very limiting approach, with an impossibly high bar, reminiscent of *Swift*.

First, the Ninth Circuit incorrectly placed a new threshold burden on Rule 60(b)(5) motions by holding that consent decrees are contracts and that absent ambiguity, what the defendants did or did not anticipate must be discerned within the consent decree's four corners. Ninth Circuit Court of Appeals Opinion, *United States of America v. ASARCO, Inc.*, App. 13a-20a. This new, threshold requirement is inconsistent with *Rufo*'s "less stringent, more flexible" approach. "A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforced as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees."

Rufo, 502 U.S. at 378. In fact, in *Rufo*, this Court stated that, on remand, it expected the district court to determine the issue of what the movant did or did not anticipate on a "fully developed record." *Id.* at 386 & n.10. Likewise, in *Agostini v. Felton*, 521 U.S. 203, 215 (1997) this Court stated: "The court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong."

Other courts of appeal, and even the Ninth Circuit in cases prior to this case, have agreed that the district court may consider extrinsic evidence with respect to the issue of whether the movant anticipated the changed circumstances. *See, e.g.*, *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1258 (9th Cir. 1999) ("Instead the *Rufo-Agostini* approach allows courts to fulfill their traditional equity role: to take all the circumstances into account in determining whether to modify or vacate a prior injunction or consent decree"); *Building and Const. Trades v. N.L.R.B.*, 64 F.3d 880, 889 (3rd Cir. 1995) (consideration of affidavit); *ALC v. Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 584 (1st Cir. 1995) (four-day evidentiary hearing); *Waste Management of Ohio, Inc. v. City of Dayton*, 132 F.3d 1142, 1146 (6th Cir. 1977) ("Case law clearly suggests that a district court is not required to remain blind to all but the words contained in the four corners of a consent decree . . . "). By limiting Rule 60(b)(5) modification to a "four corners" review, the Ninth Circuit stripped the district courts of their authority in equity and the flexibility *Rufo* dictates for consent decree modification.

This case presents a good example of how limiting review to the "four corners" of the consent decree can lead to an erroneous result. The district court had years of

experience in administering this consent decree and addressing related disputes. The district court held a two-day evidentiary hearing on the motion to modify, which included live testimony from six witnesses and deposition testimony by a seventh. Based upon the totality of the evidence, including the language of the consent decree itself, the district court made the following finding of fact: "[T]he Court finds at the time the consent decree was entered, the Defendants did not anticipate the EPA using its remedial CERCLA authority to clean up the Basin." September 30, 2001 Order, App. 28a.

The Ninth Circuit chose to disregard this finding and the evidence and limited its review to the "four corners" of the consent decree. It concluded that the United States had expressly reserved its right to "Superfund" the Basin in the consent decree and, therefore, that the defendants actually anticipated the change. Nowhere in the consent decree, however, did the United States reserve the right to "Superfund" the Basin. EPA's authority to place a site on the NPL (i.e., make it a Superfund site) is contained in CERCLA § 105(c), 42 U.S.C. § 9605(c). The consent decree contains no reservation of rights with respect to CERCLA § 105. *See* Consent Decree, ¶¶ 85, 86, & 90 (reservation of rights); ¶ 4.AD (definition of "site"), App. 83a, 84a, 87a. Moreover, listing a site on the NPL does not come within the definition of "response action," *see* CERCLA § 101(25), 42 U.S.C. § 9601(25), nor does it have anything to do with "liability." *See Honeywell International, Inc. v. E.P.A.*, 372 F.3d 441, 443 (D.C. App. 2004). Without NPL listing authority, EPA is, by statute, 42 U.S.C. § 9604(c)(1), limited to short-term response actions. EPA could never have developed a $360 million Basinwide CERCLA remedy, and demanded

Hecla pay for it, without reneging on its commitment to not list the site on the NPL.

The Ninth Circuit also ignored that the consent decree itself anticipates an approach to Basin cleanup without an NPL listing. While the district court found that EPA had reserved CERCLA remedial authorities in the consent decree, it also found that EPA had agreed to forego a singular reliance on its "remedial authority" under CERCLA, based in part on the consent decree itself. Both the 1991 and 1992 Records of Decision, "which it is undisputed are an enforceable part of the Consent Decree," *see* September 30, 2001 Order, App. 28a, specifically endorse the "multi-media approach" to a Basinwide CERCLA remedy. *Id.* The Ninth Court erred in finding that the language of the consent decree did not anticipate this alternative to "Superfunding" the Basin.

In addition to restricting the scope of the evidence which a district court may consider with respect to a motion to modify, the Ninth Circuit impermissibly substituted its judgment for the wide-ranging discretion of the district court in deciding Rule 60(b) motions. Appellate courts review rulings on Rule 60(b) motions for abuse of discretion. *See Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 263, n.7 (1978). "Determining what is 'equitable' is necessarily a task that entails substantial discretion . . . As a result, an appellate court should examine primarily the *method* in which the District Court exercises its discretion, not the substantive outcome the District Court reaches." *Rufo*, 502 U.S. at 393-394 (Justice O'Connor, concurring) (emphasis in original).

In this case, the Ninth Circuit disregarded the district court's findings of fact based on the evidence adduced at

the court's two-day hearing and came to its own conclusion as to whether it was "equitable" to grant the motion to modify. In doing so, it disregarded *Rufo*'s admonition that even if the movant *did* anticipate the changed circumstances, the motion to modify could still succeed if the movant were able to "convince the court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." *Rufo*, 502 U.S. at 385. The Ninth Circuit acknowledged that the district court had not reached this issue, but declined a remand, stating that the Panel had "a fully-developed record to review." *See* Ninth Circuit Court of Appeals Opinion, App. 21a.

> We do not accept that Defendants have made reasonable efforts to comply with the decree, or have met their heavy burden in this case, where the cost of compliance is unknown and the proper baseline against which to measure any increase in liability remains indeterminate.

Id., App. 22a.

Nothing in the record supports the Ninth Circuit's conclusion on this point. In the proceedings before the district court and on appeal, neither the United States nor the State of Idaho ever took the position or produced evidence that the defendants had failed to make reasonable efforts to comply with the decree. To the contrary, in an early ruling on the motion to modify, the district court ordered the defendants to "fully comply with all obligations under the Consent Decree for 2002 and beyond until further order of this court." District Court Order Granting the United States' Emergency Request for Clarification or Modification of the September 30, 2001 Order (Oct. 15, 2001), App. 37a. Then, two years later, in issuing its final

order, the district court modified the decree so as to "allow for almost all of the required work to be completed while still achieving the goals necessary to safeguard and monitor human health and to protect the environment." November 18, 2003 Order, App. 45a. These quotations in fact suggest that compliance with the consent decree was ongoing and not an issue. If this is now the decisive issue in the case, the matter should be remanded to the district court for decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 11, 2006

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* and STATE OF IDAHO, *Plaintiff,* v. ASARCO INCORPORATED; HECLA MINING COMPANY, *Defendants-Appellees,* and COEUR D'ALENE MINES CORPORATION; CALLAHAN MINING CORPORATION; SUNSHINE PRECIOUS METALS, INC.; SUNSHINE MINING COMPANY, INC., *Defendants.*	No. 04-35052 D.C. No. CV-94-00206-EJL
UNITED STATES OF AMERICA, *Plaintiff-Appellant,* and STATE OF IDAHO, *Plaintiff,* v.	No. 04-35479 D.C. No. CV-94-00206-EJL

COEUR D'ALENE MINES CORPORATION; CALLAHAN MINING CORPORATION; HECLA MINING COMPANY; SUNSHINE PRECIOUS METALS, INC.; SUNSHINE MINING COMPANY, INC.,

Defendants-Appellees.

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF IDAHO,

Plaintiff-Appellant,

v.

ASARCO INCORPORATED; HECLA MINING COMPANY,

Defendants-Appellees,

and

COEUR D'ALENE MINES CORPORATION; CALLAHAN MINING CORPORATION; SUNSHINE PRECIOUS METALS, INC.; SUNSHINE MINING COMPANY, INC.,

Defendants.

No. 04-35106

D.C. No. CV-94-00206-EJL

OPINION

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted
June 7, 2005 – Seattle, Washington

Filed December 5, 2005

Before: Warren J. Ferguson, Robert R. Beezer, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge Ferguson

COUNSEL

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Elizabeth H. Temkin, Denver, Colorado, for defendant-appellee Hecla Mining Company.

OPINION

FERGUSON, Circuit Judge:

In 1994, the United States and the State of Idaho (together, "Plaintiffs") entered into a consent decree with various mining companies, including Hecla Mining Company and Asarco Inc. (together, "Defendants"), requiring the latter to perform certain cleanup actions in exchange for specific liability releases in the seriously contaminated Bunker Hill Superfund Site. The site, also known as "the Box," is a twenty-one square mile area surrounded by the Coeur d'Alene River Basin ("the Basin") in northern Idaho. In 2001, the District Court modified the consent decree for the Box ("the Box Decree" or "the decree") because it found that Defendants faced unanticipated liability outside the

Box that made compliance with the decree substantially more onerous.

In 1996, the United States had filed an action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] to recover from Defendants costs incurred in cleaning up environmental contamination in the heavily mined 1500 square mile Basin. In 2003, after the Environmental Protection Agency (EPA) had completed a remedial investigation and feasibility study of, as well as a record of decision (ROD) for, the Basin, the District Court reduced Defendants' cleanup obligation under the Box decree by $7 million.

Plaintiffs presently contend that the District Court abused its discretion when it relied on extrinsic evidence, rather than the plain terms of the decree, to find that Defendants did not anticipate the EPA's contested action outside the Box. Because the decree in fact expressly reserved the United States' authority to take such action, we reverse the Court's modification order. In so doing, we hold that in modifying a consent decree under Rule 60(b)(5) of the Federal Rules of Civil Procedure, a court must first interpret the terms and provisions of the decree as it would a contract to determine if the moving party anticipated a significant change in factual conditions, thereby making modification improper.

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[1] CERCLA was enacted in 1980 and reauthorized and amended in 1986 by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986). 42 U.S.C. § 9601 *et seq.*

I. BACKGROUND

A. Bunker Hill Superfund Site

The EPA listed the Bunker Hill Superfund Site (hereinafter "the Box"), a twenty-one square mile area in Shoshone County, Idaho, on its National Priorities List in 1983 as one of the country's most contaminated sites. Over one hundred years of mining and sixty-five years of smelting activity, as well as various natural and man-made events, had caused widespread contamination in the area. The EPA's record of decision for the Box explained that, in particular, "[s]oils, surface water, ground water, and air throughout the [s]ite have been contaminated by heavy metals, to varying degrees, through a combination of airborne particulate deposition, alluvial deposition of tailings dumped into the river by mining activity, past waste disposal practices, and contaminant migration from onsite sources."

Section 104 of CERCLA permits the President to respond directly to releases or threatened releases of hazardous substances, such as those existing in the Box, by undertaking "response actions" consistent with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"). *See* 40 C.F.R. § 300.1-.86 (1985). Before selecting a response action, however, the NCP requires that the EPA first conduct a remedial investigation and feasibility study, which is designed to "assess site conditions and evaluate alternatives to the extent necessary to select a remedy" that will "eliminate, reduce, or control risks to human health and the environment." 40 C.F.R. § 300.430(a)(1)-(2). Potential response actions include a "remedial action," which is a cost-effective, long-term plan for a permanent remedy, and a "removal action," which is generally a short-term action intended to address

only emergency situations. 42 U.S.C. § 9601(24), (23); *see* ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW 186-87 (5th ed. 2000).

For purposes of the remedial investigation and feasibility study of the Box, the EPA divided the twenty-one square miles into populated and non-populated areas. The agency eventually issued a ROD for the populated areas in 1991 and a ROD for the non-populated areas in 1992. Taken together, the records of decision supported a remedial action in the Box targeting widespread heavy metal contamination in soils, surface water, and ground water and seeking to reduce associated risks to human health, particularly children's exposure to lead.

Between 1992 and 1994, Plaintiffs engaged in settlement negotiations with potentially responsible parties ("PRPs"), including Defendants, after filing a complaint against them to recover costs for the EPA's remedial action in the Box.[2] The parties agree that at the time of their negotiations the EPA expressed its intent not to use CERCLA remedial authority to clean up contamination (or "superfund" the area) outside the Box. Instead, it planned to address the environmental contamination in that area through the Coeur d'Alene Basin Restoration Project ("the Basin Restoration Project"), a cost-effective, long-term

[2] While sections 106 and 107 of CERCLA authorize the Attorney General to sue responsible parties who have contributed to contaminating a Superfund site, including past, remote, and future owners, operators, generators, arrangers, and transporters, section 122(a) of CERCLA encourages settlement agreements between the United States and PRPs for expediting effective remedial action and minimizing litigation. *See* FINDLEY & FARBER, *supra*, at 202. The State of Idaho joined the complaint against Defendants pursuant to relevant state law and section 107 of CERCLA. *See* 42 U.S.C. § 9607.

approach, not a "response action," that was designed to be a public and private venture among local, state, and federal agencies, the Coeur d'Alene Tribe, and private property owners in the Basin (including Defendants).

In 1994, the District Court entered the parties' settlement as a consent decree in which Defendants, among other PRPs, agreed to perform certain cleanup actions in the Box's populated areas and Plaintiffs assumed primary responsibility for the Box's non-populated areas. The parties agree that the United States explicitly reserved in the decree the right to pursue PRPs for "liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside the Site." Consent Decree (CD) ¶ 90(2). In addition, no party disputes that, under the decree, the United States "retain[ed] all authority and reserve[d] all rights to take *any and all* response actions authorized by law." CD ¶ 93 (emphasis added). Moreover, the parties recognize that the decree limited the United States' covenant not to sue the PRPs strictly to the Box. CD ¶ 84a.

B. Modification of Consent Decree

In March 1996, nearly two years after the District Court had approved the consent decree for the Box, the United States, at the request of the EPA, the Department of the Interior, and the Department of Agriculture, filed an action to recover from PRPs, among other things, damages under CERCLA for injury to natural resources in the heavily mined Basin, that is, the area outside the Box.[3] In

[3] The State of Idaho is not a party to the Basin litigation. It nonetheless asserts that the consent decree for the Box should remain distinct from the unresolved disputes concerning the Basin.

early 1998, the EPA publicly announced that it would be conducting a remedial investigation and feasibility study of the Basin. Three years later, in January 2001, Defendants filed a motion in the District Court of Idaho to modify the consent decree, contending that the EPA's decision to superfund the Basin constituted an unanticipated change in factual circumstances that made compliance with the Box decree substantially more onerous.

In particular, Defendants alleged that the EPA had repeatedly assured them that it would not expand the Superfund site from the Box to the Basin.[4] Despite recognizing that the decree specifically reserved the United States' right to superfund the Basin, the District Court relied on oral and written assurances that the EPA had allegedly given Defendants prior to and after entering the decree to find that the latter did not anticipate the contested action. The Court found that between 1991 and early 1998, the EPA consistently stated "that actions outside the Box would be coordinated with the broader objectives of the Coeur d'Alene Restoration Project . . . and regulatory tools *other than* remedial authority under CERCLA." The Court explained that "[t]his finding [was] based on repeated representations and references to the 'multimedia approach' in letters, in the 1991 and 1992 RODs . . . in conversations with EPA management, in the

[4] We note that Defendants previously challenged the EPA's expansion of the Superfund site boundaries from the Box to the Basin in *United States v. Asarco Inc.*, 214 F.3d 1104 (9th Cir. 2000). We held there that while the EPA gave adequate notice of the expansion, the D.C. Circuit had exclusive jurisdiction to rule on any challenge to the expanded boundaries. *Id.* at 1107. Defendants subsequently filed a notice with this Court indicating that they were not filing an appeal in the D.C. Circuit, in effect abandoning their formal challenge to the EPA's expansion of the Superfund site boundary lines.

[Basin Restoration Project] Framework document and in Department of Justice pleadings to the Court in this case and in *United States v. Asarco, et al.*, 96-122-N-EJL." On September 30, 2001, the Court held that modification of the decree was appropriate because enforcement of the decree as it stood would drive "the mining industry out of business" and "bleed[] the companies to death."

The District Court nevertheless withheld deciding on actual modifications to the consent decree until the EPA had completed the Basin's remedial investigation and feasibility study and ROD. The EPA issued the ROD in September 2002, and the Court issued an order on November 18, 2003 reducing Defendants' financial obligation under the decree by $7 million.[5] The Court subsequently approved the parties' allocation of the $7 million in an April 16, 2004 order. Plaintiffs timely appealed the Court's last two orders, which this Court has consolidated for purposes of this appeal.

II. STANDARD OF REVIEW

Motions for relief from judgment under Rule 60(b) are reviewed for abuse of discretion. *Casey v. Albertson's Inc.*,

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[5] The District Court arrived at $7 million by considering the original, undisputed estimated cost for the Box ($40 million), the expenditures to date ($44.7 million), and the estimated cost of the remaining work in the Box ($27 to $35 million in present value). Although the Court conceded that "[Defendants'] liability for the Basin is still unknown," it 1) subtracted $40 million from $44.7 million, which is $4.7 million; 2) added that amount to $31 million (the middle figure in the range of estimated remaining costs for the Box), which is $35.7 million; and 3) calculated 20% of that amount, which is $7.14 million. Notably, the District Court failed to explain the basis for reducing Defendants' obligations by approximately 20%.

362 F.3d 1254, 1257 (9th Cir. 2004) (citing *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001)). "A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Casey*, 362 F.3d at 1257 (citing *Bateman v. United States Postal Serv.*, 231 F.3d 1200, 1223 (9th Cir. 2000)). Here, because the facts are generally undisputed, we face a mixed question of law and fact. A mixed question of law and fact exists when there is no factual dispute, the rule of law is clear, and the question is whether the facts satisfy the legal rule. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). Mixed questions of law and fact are reviewed de novo. *United States v. City of Spokane*, 918 F.2d 84, 86 (9th Cir. 1990).

III. DISCUSSION

The District Court modified the consent decree under Rule 60(b)(5) of the Federal Rules of Civil Procedure, which provides in relevant part that a court may relieve a party from a final judgment when –

> the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is *no longer equitable* that the judgment should have prospective application[.]

(emphasis added.) "[This] Rule codifies the courts' traditional authority, inherent in the jurisdiction of the chancery, to modify or vacate the prospective effect of their decrees[.]" *Bellevue Manor Assoc. v. United States*, 165 F.3d 1249, 1252 (9th Cir. 1999) (internal quotations and citations omitted).

In *Rufo v. Inmates of Suffolk County Jail,* the Supreme Court articulated the applicable two-prong standard for modifying a consent decree under Rule 60(b)(5). 502 U.S. 367 (1992). The moving party must satisfy the initial burden of showing a significant change either in factual conditions or in the law warranting modification of the decree. *Id.* at 384. The district court must then determine whether the proposed modification is suitably tailored to resolve the problems created by the changed factual or legal conditions. *Id.* at 391. In particular, "[i]f the movant cites significantly changed factual conditions," as Defendants do here, "it must additionally show that the changed conditions make compliance with the consent decree 'more onerous,' 'unworkable,' or 'detrimental to the public interest.'" *Small v. Hunt,* 98 F.3d 789, 795 (4th Cir. 1996) (quoting *Rufo,* 502 U.S. at 384). A court should not ordinarily modify a decree, however, "where a party relies upon events that actually were anticipated at the time it entered into a decree." *Rufo,* 502 U.S. at 385 (citation omitted).

Defendants bore the initial burden in the District Court of showing that the EPA's decision to superfund the Basin constituted a significant and unanticipated change in factual conditions warranting modification of the decree. *See id.* at 384-85. "If it is clear that [Defendants] anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, [Defendants] would [then] have to satisfy a heavy burden to convince a court that [they] agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." *Id.* at 385. We refer to this latter requirement as the heavy burden standard.

We recognize Defendants' valid concern that Rule 60(b)(5) should be treated as a flexible standard. Defendants correctly maintain that the Rule is designed to provide judges with discretion and flexibility in modifying a decree. In *Rufo,* the Supreme Court explains that "[b]ecause such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased." *Id.* at 380 (citation omitted). But the likelihood of significant changes occurring over the life of the decree does not mean that courts have unbridled discretion to modify a decree when a party actually anticipated the changed factual circumstances in question. *Rufo* makes clear that "on such terms as are just, a party may be relieved from a final judgment or decree where it is no longer equitable that the judgment have prospective application[.]" *Id.*

Accordingly, we address two questions in this appeal. First, did Defendants anticipate at the time they entered into the decree that the EPA would superfund the Basin? Second, if so, did Defendants satisfy the heavy burden standard established in *Rufo*? We find that Defendants indeed anticipated that the EPA might superfund the Basin and, in addition, failed to meet the heavy burden standard because they did not make a reasonable effort to comply with the decree. Thus, we need not address whether the actual modification of the decree is suitably tailored under *Rufo's* second prong in order to conclude that the District Court abused its discretion in modifying the consent decree.

A. Defendants Anticipated the EPA's Contested Action

The parties do not challenge on appeal the consent decree's unequivocal terms or conditions. In fact, they agree that under the decree, the United States "retain[ed] all authority and reserve[d] all rights to take any and all response actions authorized by law." CD ¶ 93. Moreover, Defendants notably stated in their answering brief to this Court that "[t]he companies in this case have never questioned [the] EPA's authority to exercise CERCLA authorities outside the Box. In this regard, the governments are correct that the Decree's reservation of rights confirms the parties' expectation that the EPA *might* take such action." The District Court also found in no uncertain terms "no legally binding commitment either in the Consent Decree or in the related Records of Decision that would prohibit the EPA from using full CERCLA remedial authority outside the Box."

The exact issue here, then, is whether the District Court erred in modifying Defendants' obligation under the decree on the basis of extrinsic evidence that suggests that Defendants did not anticipate the contested action. Ultimately, we must determine to what extent contract principles apply when modifying a consent decree as a matter of equity under Rule 60(b)(5).

1. *Consent Decrees*

Without question courts treat consent decrees as contracts for enforcement purposes. A consent decree, like a contract, must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the decree. In *United States v. Armour & Co.*, for example, the Supreme Court found that defendant, a meat

packing company, did not violate the terms of the meat packers consent decree of 1920, which forbade meat packing companies from owning grocery stores, by allowing Greyhound to buy an ownership share of its stock while simultaneously owning grocery subsidiaries. 402 U.S. 673, 682-83 (1971). The Court reasoned that if the government wanted to prevent a single corporation like Greyhound from owning both meat packing companies and grocery stores, it should have provided such a prohibition in the decree. After all, "[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms.... Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *Id.* at 681.

The Supreme Court rearticulated its *Armour* holding in *United States v. ITT Continental Baking Co.*, where it considered extrinsic evidence to interpret a vague term in a consent decree. 420 U.S. 223 (1975). The case involved a Federal Trade Commission consent order prohibiting baking companies such as ITT Continental from "acquiring" other baking companies. In construing the term "acquiring" in the decree, the Court took into account evidence of events surrounding the negotiation of, and other documents incorporated in, the decree. The Court explained that "[s]uch reliance [on extrinsic evidence] does not in any way depart from the 'four corners' rule of *Armour*" because where contract terms are ambiguous, "reliance upon certain aids to construction is proper, as with any other contract." *Id.* at 238.

This Court has applied contract principles in accordance with Supreme Court precedent when interpreting

consent decrees. *See Molski v. Gleich,* 318 F.3d 937, 956 (9th Cir. 2003) (Graber, J., specially concurring) (stating that "[i]n construing a consent decree, we apply the same principles used to interpret a contract.") (citing *Thompson v. Enomoto,* 915 F.2d 1383, 1388 (9th Cir. 1990)); *Gates v. Shinn,* 98 F.3d 463, 468 (9th Cir. 1996) (discussing how "[a] consent decree is . . . 'in some respects contractual in nature'" and, as such, "[c]ourts must find the meaning of a consent decree 'within its four corners[]'") (citing *Rufo,* 502 U.S. at 378; *Armour & Co.,* 402 U.S. at 681-82); *Enomoto,* 915 F.2d at 1388 (explaining that "[i]n construing consent decrees, courts use contract principles").

2. *Modification Under Rule 60(b)(5)*

Defendants contend, however, that a court need not interpret a consent decree within its four corners in order to modify it. Since Rule 60(b)(5) is a rule grounded in equity, Defendants maintain that courts must instead weigh the totality of the circumstances when determining if a moving party anticipated a contested change in factual circumstances.

We disagree with Defendants because modification of a consent decree invariably hinges on interpretation of the very terms of the decree. That is, in order to discern if Defendants anticipated that the EPA might superfund the Basin, we must first interpret the decree, which embodies the parties' careful negotiation and enforceable commitments. Only if the decree's terms are ambiguous – for example, if it is not clear in the decree whether Defendants anticipated the EPA's contested action – do we consider extrinsic evidence.

This case does not present a novel issue. The Fourth Circuit's decision in *Thompson v. HUD* illustrates how a court, in modifying a consent decree, must necessarily first interpret the terms of the decree. 220 F.3d 241 (4th Cir. 2000). *Thompson* involved a group of African American public housing residents who entered into a consent decree with the United States Department of Housing and Urban Development (HUD) requiring that new family housing financed with public funds be located in non-impacted areas (areas without high concentrations of minority residents or public housing). The decree purported to eliminate racial segregation and discrimination in Baltimore's public housing system. But instead of abiding by the decree, the local defendants decided that a more viable plan than the one agreed to would be to construct senior housing in impacted areas. The district court modified the consent decree to allow local defendants to seek federal funds for their new plans.

The Fourth Circuit reversed the district court on the ground that a particular section in the consent decree, into which the parties knowingly and voluntarily entered, "provide[d] that, until the other obligations under the Decree ha[d] been satisfied, any new construction of public housing built with public housing funds must be located in a non-impacted area." *Id.* at 247. The plain terms of the decree, despite the viability of the senior housing plans, "ma[d]e[] it clear that the parties contemplated that new construction would be required or desired during the life of the Consent Decree." *Id.* Because the local defendants anticipated this change in factual circumstances, the Fourth Circuit found that modification of the decree was unwarranted.

The Fourth Circuit's decision in *United States v. Bishop Processing Co.*, although predating *Rufo*, further supports our understanding that a court must first interpret the decree in deciding whether to modify it on the basis of changed factual circumstances. 423 F.2d 469 (4th Cir. 1970). There, the Fourth Circuit refused to modify a consent decree to include limitations that appeared nowhere in the agreement. The Bishop Processing Company, operator of a rendering and animal reduction plant, entered into a consent decree with the United States and the states of Delaware and Maryland; the decree required Bishop to cease all manufacturing and processing of malodorous air pollution upon a filing of an affidavit by the Director of Delaware's Air Pollution Control Division stating that Bishop was discharging malodorous air pollution across state lines. After being ordered twice to cease operations, Bishop contended that the decree was entered into with various "understandings" about investigative procedures to be used by the Director, procedures inconsistent with the ones that the Director had used in reporting Bishop's actions. *Id.* at 472.

Our sister circuit found Bishop's "understandings" unavailing because "Bishop had ample opportunity to propose incorporation in the decree of any protection it may have felt necessary, and to object to procedures it deemed contrary to its understanding of the decree's terms." *Id.* It added that "[Bishop] cannot now ask the court to revise the decree by inserting language or to interpret it to embrace matters which, if present at all, were lurking in the recesses of Bishop's corporate mind." *Id.*

Here, as in *Thompson*, the plain terms of the consent decree reveal the parties' expectation that a particular

change in factual circumstances might occur during the lifetime of the decree. In fact, the decree provided that the United States reserved its "rights to take any and all response actions authorized by law" and to pursue Defendants for liability for response costs incurred outside the Box. CD ¶¶ 93, 84a. As in *Bishop,* Defendants also had "ample opportunity to propose incorporation" of a provision in the decree prohibiting or limiting the EPA from superfunding the area outside the Box. *Bishop,* 423 F.2d at 472. Indeed, Defendants conceded at oral argument and in their answering brief that the "EPA refused to provide any commitments in the Box Decree as to its intentions outside the Box." The District Court itself recognized that "if such a [binding] commitment [on the Basin] had been reached . . . such a commitment would have been drafted into the decree." As in *Bishop Processing Co.* and *Thompson,* we find that the decree in this case is plain in its terms and, as such, Defendants anticipated that the EPA might superfund the area outside the Box.

Defendants' reliance on *Bellevue Manor Assoc. v. United States* as a case establishing a totality of the circumstances test for modification is unavailing. 165 F.3d 1249 (9th Cir. 1999). *Bellevue* does not announce such a test. We merely expanded *Rufo's* application in *Bellevue* to all petitions brought under Rule 60(b)(5), which "is routinely used to challenge the continued validity of consent decrees, which courts often liken to contracts." *Id.* at 1253 (footnote and citation omitted). In particular, we found that a purely private commercial contract between HUD and private landlords who participated in a federal rent subsidy program could be challenged under Rule 60(b)(5) because the Rule's plain language does not except final judgments interpreting commercial contracts, and courts

have applied the Rule in essentially private cases. In short, *Bellevue* does not support Defendants' position.

Were we to replace the unambiguous language in the consent decree, providing that the EPA could superfund the Basin, with Defendants' contrary "understanding" that the EPA promised it would not do so, we would defy the decree's specific purpose. The decree purports to hold Defendants, who are potentially responsible parties, accountable for eliminating the waste and contamination in the Box's populated areas. To hold otherwise would also strip the decree of its broader purpose, "which is to enable parties to avoid the expense and risk of litigation while still obtaining the greater enforceability (compared to an ordinary settlement agreement) that a court judgment provides." *Jeff D. v. Kempthorne,* 365 F.3d 844, 852 (9th Cir. 2004) (citations omitted).

3. *Extrinsic Evidence*

Even assuming that the consent decree's terms are ambiguous, there is conflicting evidence at best as to the EPA's promises to Defendants that it would not superfund the area outside the Box. Indeed, in its November 24, 1992 letter to Defendants regarding the Bunker Hill Site/Coeur d'Alene Basin, the EPA explained that "[it] [did] not *currently intend* to expand the use of CERCLA remedial authorities beyond those actions outlined in the Bunker Hill [ROD]." (emphasis added.) It also stated that "[t]he success of [the Basin Restoration Project] *depends* on cooperation and coordination with affected private parties and public land management agencies." (emphasis added.) The EPA's statements were statements of present intent, not enforceable promises.

Additionally, when the EPA's attorney asked Asarco's lawyer, James L. Woods, during his September 21, 2001 deposition whether "anyone from EPA ever t[old] [him] that the Agency would never, ever exercise Superfund remedial authority outside of the Box" or "expand the bounds of the Superfund site," Woods replied with the following:

> I believe – can I point to a specific statement to that effect, no. But I had the clear intention that that's what they were saying. The direct answer to your question is I do not recollect a specific statement to that effect.

Woods's statement demonstrates that even if we were to consider extrinsic evidence, Defendants cannot prove that the EPA promised them, unequivocally or explicitly, that it would not superfund the area outside the Box.

Accordingly, while the District Court found that "all of the parties to the Consent Decree hoped the [Basin Restoration Project] would be successful in cleaning up the Basin," we find that these expectations are not a basis for modifying the decree. Mere hopes do not translate into enforceable promises. The EPA expressly reserved in the decree the right to superfund the area outside the Box and, as such, Defendants anticipated this change in factual circumstances. The District Court erred in concluding that Defendants did not anticipate this change in circumstances on the basis of extrinsic evidence.

B. Defendants Made No Reasonable Effort to Comply with the Decree

Because the District Court concluded that changed factual circumstances were not anticipated, it did not

apply the appropriate heavy burden standard established in *Rufo*. When a party anticipates changing conditions that would make performance of the decree more onerous, "the party [must] satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." *Rufo*, 502 U.S. at 385. We must therefore decide whether to remand to the District Court, or determine on the basis of the record before us whether Defendants meet this burden.

The Fourth Circuit addressed a similar situation in *Thompson*, 220 F.3d 241. There, the district court also rejected the plaintiffs' contention that any change in circumstances was anticipated at the time of the consent decree, and so did not analyze the defendants' modification request under the proper heavy burden standard. The Fourth Circuit did not remand the case, however, because it had a "[fully-developed] record [that] reveal[ed] no evidence that the Local Defendants made a reasonable effort to comply with the requirements . . . of the Consent Decree, as required by *Rufo*." *Id.* at 248. The local defendants, for example, neither investigated funding the senior housing project through use of monies not prohibited by the decree nor evaluated locating the senior village in a non-impacted area.

Here, as in *Thompson*, a remand is not required. The District Court held an evidentiary hearing on the modification request, and we have a fully-developed record to review. *See Bellevue*, 165 F.3d at 1257 (explaining that a "[r]emand is not necessary where the issue has been fully briefed on appeal, the record is clear and remand would 'impose needless additional expense and delay . . . '" (quoting *In re Pintlar Corp.*, 133 F.3d 1141, 1145 (9th Cir.

1998))). In seeking to justify a modification to the decree, Defendants allege that the EPA's decision to superfund the Basin has significantly impacted their financial footing. The record before us, however, does not provide any definitive indication that Defendants' financial situation is in peril or that its situation has significantly changed as a result of the EPA's decision to superfund the Basin. Rather, Defendants' allegations are at best speculative given that it is unclear what liability Defendants now face in the Basin compared to what they would have faced under the Basin Restoration Project. We do not accept that Defendants have made reasonable efforts to comply with the decree, or have met their heavy burden in this case, where the cost of compliance is unknown and the proper baseline against which to measure any increase in liability remains indeterminate.

Because Defendants have not made any reasonable efforts to comply with the decree, we find that they should not be relieved under Rule 60(b)(5) of their obligations in the Box.

IV. CONCLUSION

For the foregoing reasons, we reverse the District Court's order modifying the consent decree at issue in this case.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and STATE OF IDAHO Plaintiffs, vs. ASARCO INCORPORATED; COEUR D'ALENE MINES CORPORATION; CALLAHAN MINING COMPANY; SUNSHINE PRECIOUS METALS; SUNSHINE MINING COMPANY, Defendants.	Case No. CV94-206-N-EJL **ORDER** (Filed Sept. 30, 2001)

Pending before the Court in the above-entitled matter is Defendant Hecla and Asarco's Motions to Modify Consent Decree (Docket Nos. 55 and 56). The Court heard oral argument on the motion on August 22, 2001. The Court then scheduled a limited evidentiary hearing regarding the EPA's position on cleanup of the Coeur d'Alene Basin. Having now fully considered the testimony, the exhibits admitted into evidence and the briefs and arguments of counsel the Court is prepared to rule on the motions.

Defendants Hecla and Asarco seek to have the Court modify the 1994 Consent Decree concerning the Bunker Hill Superfund Site (the "Box") based on three factors which they contend make compliance with the Consent Decree substantially more onerous than originally anticipated. First, the

Defendants claim the settlement agreement between the United States and Sunshine Defendants in civil case *USA v. Asarco, et al.*, 96-122-N-EJL, releasing Sunshine Defendants from further liability under the 1994 Consent Decree justifies modification. The Court orally ruled this factor was not a basis for modification of the Consent Decree. When the Consent Decree was entered it was certainly foreseeable that certain of the settling defendants could end up filing for bankruptcy and that the remaining, solvent defendants would still have responsibility under the Consent Decree for completing the work. Moreover, the Consent Decree is not substantially mare onerous on Hecla and Asarco as the Sunshine Defendants were not paying a significant portion of the actual costs incurred. Finally, to allow modification to Hecla and Asarco's obligations based on the settlement of the Sunshine Defendants would be against the public interest as it would give unjust enrichment to Defendants who have not to settled the related natural resources damages action.

Second, Defendants claim the EPA and the state of Idaho's work plans under the Consent Decree have made the amount and cost of remedial work substantially greater than the Defendants expected. Again, the Court orally ruled this factor was insufficient to justify a modification of the Consent Decree. The Defendants admit that the estimated costs at the time the Consent Decree was entered were simply that, "estimated" costs. While it is true the actual work completed has cost millions more than "estimated" the Defendants knew there was a risk of actual costs exceeding estimated costs and that they would still be liable for the actual costs. The Plaintiffs have also paid more than they estimated for the work in the non-populated areas of the Box. Additionally, the Consent

Decree provides an administrative process for the Defendants to object to work plans they believe exceed the scope of the Consent Decree. This administrative process has previously been used by the Defendants to reduce their costs on certain Consent Decree work.

Third, the Defendants claim the EPA's change in position on how it would approach clean up in the Basin (versus the Box) justifies a modification of the consent decree. This is the issue the Court held an evidentiary hearing on to shed light on the following issues: 1) whether or not there is an ambiguity in the Consent Decree regarding the EPA's alleged commitment on clean up of the Basin and 2) even if the EPA's alleged commitment was not a term of the Consent Decree, does the Court by reason of its continuing jurisdiction over the Consent Decree and the provision of Fed R. Civ. P. 60(b)(5) have authority to modify a decree on such terms as are just.

Rule 60(b), provides in part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or other wise [sic] vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . .

In *Rufo v. Inmates of Suffolk County*, 502 U.S. 367 (1992), the Supreme Court held the party seeking modification of consent decree bears the burden of establishing that a

significant change in circumstances warrants revision of decree. The Ninth Circuit has held "the *Rufo* standard applies to all Rule 60(b)(5) petitions brought on equitable grounds." *Bellevue Manor Associates v. United States*, 165 F.3d 1249, 1257 (9th Cir. 1999).

The district court should exercise flexibility in considering a request for modification, however, a modification will not be warranted in all circumstances. *Rufo* at 383. Modification may be warranted based on a significant change in factual conditions or in law. *Id.* at 384. Specifically, the Court recognized three situation's that could warrant revision of a decree: 1) "when changed factual conditions make compliance with the decree substantially more onerous;" 2) "when a decree proves to be unworkable because of unforeseen obstacles;" or 3) "when enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 384. "[H]owever, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." *Id.* at 385.

It is the issue of "anticipation" that the parties hotly dispute. Plaintiffs maintain the EPA's authority and right to apply CERCLA remedial authority to the Basin could and should have been anticipated by Defendants. Defendants argue, based on the repeated representations of the EPA prior to and during decree negotiations, Defendants could not have reasonably anticipated EPA would seek to "superfund" the entire Basin.

Based on the evidence received, the Court makes the following findings:

The Court does not find there is any ambiguity in the Consent Decree. The Court finds the decree clearly sets

forth the agreements of the parties *as it relates* to the Bunker Hill Superfund Site. As stated in a previous order, both sides of a contract of this nature are presumed to know the relevant CERCLA law when they entered into the Consent Decree, so the Court finds it was understood by the parties that the EPA had the "authority" to apply remedial CERCLA authority outside the Box and hold the potentially responsible parties ("PRPs") liable for alleged injury outside the Box. There is no legally binding commitment either in the Consent Decree or in the related Records of Decision that would prohibit the EPA from using full CERCLA remedial authority outside the Box. In fact, the documents expressly limit EPA's covenant not to sue to the Box. The language in the documents is consistent with the testimony of the EPA's negotiating attorney who indicated the Defendants consistently sought a binding commitment on the Basin and the EPA consistently rejected such broad relief. This Court has great respect for the attorneys who represented Hecla and Asarco during the negotiations, and if such a commitment had been reached, the Court is confident such commitment would have been drafted into the decree.

The Court does find, however, based on assurances given and consistent statements of intent made between 1991 and February of 1998, that actions outside the Box would be coordinated with the broader objectives of the Coeur d'Alene Basin Restoration Project ("CBRP") and regulatory tools *other than* remedial authority under CERCLA.[1] This finding is based on the repeated representations

[1] The Court acknowledges the Defendants knew EPA might use some CERCLA authority other than "remedial authority" outside the Box. The Defendants' witnesses testified it was understood during

(Continued on following page)

and references to the "multi-media approach" in letters, in the 1991 and 1992 Records of Decision (which it is undisputed are an enforceable part of the Consent Decree), in conversations with EPA management, in the CBRP Framework document and in Department of Justice pleadings to the Court in this case and in *United States v. Asarco, et al.*, 96-122-N-EJL.

The Supreme Court rejected the argument that a decree can only be modified when a change in facts is both "unforeseen and unforeseeable." *Rufo* at 385. Since there was no legal commitment outside the Box, it was arguably "foreseeable" that the EPA might change their course of action. However, such was not anticipated based on the oral and written assurances given. For these reasons, the Court finds at the time the Consent Decree was entered, the Defendants did not anticipate the EPA using its remedial CERCLA authority to clean up the Basin.

Ms. Rasmussen, EPA Regional Administrator for Region 10, acknowledged that she had "apparent authority" to speak for EPA and that she would expect one to rely on statements made by her. She did not believe she made the statements attributed to her, but she also admitted she does not have a recollection of any meetings with the management of Hecla or Asarco or statements made. Mr. Brown, Chairman and President of Hecla, on the other hand, had a specific recollection of the meetings and statements made and the exhibits support his understanding. The credibility of his recollection is enhanced by the

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negotiations that CERCLA clean up and removal authority for emergency and non-time critical sites in the Basin as well as action under the natural resources damages sections of CERCLA were possible remedies which would be used by the EPA.

circumstances then existing and the significance of the same to the survival of the mining companies.

The Government's argument that the Regional Director could not legally bind the United States Government nor the state of Idaho is not relevant because the Consent Decree is not being held invalid nor does modification under Rule 60(b)5 require "actual authority."

The Court further finds that the statements and testimony of the United States and the state of Idaho's witnesses concerning the negotiations surrounding the matters to be included in the Consent Decree are credible and supported by the wording of the Consent Decree itself. That does not negate, however, the Court's ability to determine whether or not the trade offs within the Superfund site were made in light of the assurances given. Based on the testimony given, it is difficult for this Court to believe that reputable business men, accountable to financial institutions, as well as stockholders, would not foremost be concerned with how far their dollars would reach and what could be done to keep the company afloat.

The Court finds that all of the parties to the Consent Decree hoped the CBRP would be successful in cleaning up the Basin. Only after the Consent Decree was signed and approved by the Court and a few years had passed were the Defendants able to "anticipate" that the CBRP would not meet the goals of the EPA. Defendants were first put on notice of the change in circumstance as to how cleanup of the Basin would be approached in early 1998 when the EPA publicly announced that it would be conducting an

Remedial Investigation Feasibility Study (RI/FS) on the Basin.[2]

The Court clearly has continuing jurisdiction over the Consent Decree and the authority under the law (60(b)5) to modify a decree on such terms as are just. The Court concludes as a matter of law that Defendants have carried their burden in establishing there has been a significant change in factual circumstances and these changes were not reasonably anticipated by the Defendants at the time the Consent Decree was signed.

The next issue to resolve is whether the change in position by the EPA to conduct a Basin-wide RI/FS has made compliance with the decree "substantially more onerous." Plaintiffs argue the change has not made compliance more onerous as Defendants have continued to conduct the work and, in fact, waited for three years since the announcement on the Basin RI/FS to file their motion to modify the Consent Decree. Plaintiffs also argue the obligations under the Consent Decree for clean up of the Box have not increased based on the EPA's decision to exercise remedial CERCLA authority in the Basin. These arguments are correct factual statements, however, they

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[2] EPA's policy is that it may revise NPL site boundaries at any time. The Ninth Circuit has held that EPA gave adequate notice of the expansion of the Superfund site boundaries from the Box to the Basin when the EPA filed the complaint in *United States v. Asarco, et al.*, 96-122-N-EJL. *United States v. Asarco Incorporated*, 214 F.3d 1104 (9th Cir. 2000). The Ninth Circuit also ruled any challenge to the expanded boundaries would need to be filed in the United States Court of Appeals for the District of Columbia. *Id.* at 1107. The Defendants filed a notice with the Court indicating they were not filing an appeal in the District of Columbia. *See* Docket No. 887 in *United States v. Asarco, et al.*, 96-122-N-EJL.

ignore the financial reality of the EPA's decision to conduct a Basin-wide RI/FS.

Once the EPA's decision was made to conduct an RI/FS and such decision was announced publicly, the financial impact on both Hecla and Asarco was significant. No longer were their sources of credit or equity available to finance operations which fund payments under the Consent Decree. Third parties questioned the companies regarding the potential liability to the companies for remedial clean up of the Basin. While the Plaintiffs argue it is speculative how much liability Hecla and Asarco will have under the RI/FS as PRPs, based on the damages and injuries presented to this Court by the United States in the natural resource damages action, significant potential liability is more probable than not. The only real speculation in this situation is what other companies, if any, remain in business (and that have not already settled) that could potentially share the financial burden of cleaning up the Basin under the RI/FS.[3] The certainty and finality bargained for dissipated and created a greater risk for investors. When financing could not be obtained the mining companies had to sell assets and this resulted in additional layoffs of workers.

Now instead of being financially committed to just the Box the Defendants are exposed to liability far beyond what was contemplated. Financial institutions have reacted accordingly. While Defendants acknowledge they faced liability outside the Box under the CBRP, such liability was understood to be somewhat more flexible,

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[3] Based on testimony in United States v. Asarco, et al., 96-122-N-EJL, the RI/FS is expected to be complete in December 2001.

include cooperation from a number of agencies (both State and Federal) as well as private enterprise and provide for a time line that would encourage voluntary action.

The Plaintiffs arguments that the change in direction outside the Box does not make obligations inside the Box substantially more onerous is unpersuasive. However, the Court does not have the necessary facts before it to quantify how much *more* onerous compliance has become. While the Court is aware of the scope of the RI/FS being conducted based on testimony in *United States v. Asarco, et al.*, 96-122-N-EJL, it is unclear to the Court how much *increased* liability Defendants Hecla and Asarco will face under the Basin RI/FS than they had under the "multi-media approach" to clean up of the Basin.

Based on this Court's familiarity with EPA's plans for the Basin, the Court believes the overall liability under the RI/FS for the area outside the Box will be substantial. The Court is putting the parties on notice that it believes it is highly likely the Defendants will be able to establish that compliance under the Consent Decree has become substantially more onerous. Then the Court will have to determine whether the Defendants' proposed modification is "suitably tailored to the changed circumstances." *Rufo* at 370-71. Absent the Basin RI/FS being finalized and a Record of Decision being issued, it is impossible for the Court to tailor an appropriate modification.

Defendants requested a modification equal to a reduction in their obligations in the amount of $14.5 million dollars plus a reduction in on-going monitoring

costs.[4] The Plaintiffs indicated at the evidentiary hearing that this was the first time they had heard of the monetary request being sought by the motions to modify. The Court agrees with the Plaintiffs that they have had insufficient time to consider, prepare or present evidence on the appropriateness of the Defendants' requested modification.

In conclusion, the Court finds the changed circumstances were not anticipated and were not the result of fault by any party subsequent to the negotiation process. The "multi-media approach" to clean up the Basin was undertaken in 1991 and continued until late 1997 when it was determined by the EPA a different approach to clean up was necessary. Considering the totality of the circumstances surrounding the entry of the Consent Decree, the EPA's decision to proceed with a Basin RI/FS is a substantial change in circumstances. Exactly how onerous the Basin RI/FS will make compliance with the 1994 Consent Decree is unclear. However, enforcement of the Consent Decree without modification could be detrimental to the public interest because enforcement as contemplated is putting the mining industry out of business. While depressed metal prices might have put some of the mining companies out of business or in bankruptcy, Mr. Pfahl and Mr. Brown both testified that the demands being made

[4] The $14.5 million represents the amount of monies either spent or expected to be spent on clean up of the Pinehurst area. Defendants argue they did not cause any of the harm in the Pinehurst area by their historical operations and this would be a fair reduction in their obligations under the Consent Decree based on the change in circumstances. Plaintiffs argue this would not be a fair modification as clean up of the Pinehurst area was a trade off in negotiations and Plaintiffs ended up with clean up responsibility in non-populated areas where the Defendants had historically operated.

under CERCLA, and not the market conditions, are bleeding the companies to death. If the parties are unable to agree upon a fair and just modification to the Consent Decree based on this Order, then the Court will conduct further hearings after the Record of Decision on the Basin RI/FS is issued and the Court will determine an appropriate remedy.[5]

Order

Being fully advised in the premises, the Court hereby orders that:

1) Plaintiffs Joint Motion in Limine (Docket No. 91) is DENIED.

2) Defendants Hecla and Asarco's Motions to Modify Consent Decree (Docket Nos. 55 and 56) are GRANTED IN PART AND DENIED IN PART consistent with this Order. The Court will conduct further hearings on this matter after the Record of Decision on the Basin RI/FS is completed. The Court orders the Defendants to continue to remediate the "high risk yards" in the Box pending a determination of an appropriate modification to the Consent Decree.

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[5] Plaintiffs argue this Court cannot award a judgment in favor of the Defendants as such is barred by the United States' sovereign immunity and the Eleventh Amendment. The Court has no intention of awarding a money judgment in favor of Defendants. Rather, the Court has the authority to modify the consent decree "upon such terms as are just" pursuant to Rule 60(b) and any reduction in the Defendants' obligations under the Consent Decree would not be barred by the Plaintiffs arguments.

ORDERED this 30th day of September, 2001.

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. ASARCO INCORPORATED; COEUR D'ALENE MINES CORPORATION; CALLAHAN MINING COMPANY; SUNSHINE PRECIOUS METALS; SUNSHINE MINING COMPANY, Defendants.	Case No. CV94-206-N-EJL **ORDER** (Filed Oct. 15, 2001)

Pending before the Court in the above-entitled matter is Plaintiffs' Emergency Request for Clarification or Modification of the Court's September 30, 2001 Order (Docket No. 99). The court's staff attorney contacted counsel and indicated that any responsive briefing to the motion needed to be filed by the morning of October 15, 2001. The Court has reviewed the motion and related briefing and is now prepared to rule on the emergency request.

In the Court's Order of September 30, 2001, it was not the intent of the Court to modify the Consent Decree in any particular at this time. The Court's directive to the Defendants to continue with "high risk" restoration projects was to ensure there was not a slow down in the work required under the Consent Decree and because it was the Court's impression from what counsel stated at

the hearing that "high risk" work was the type of work being done at the present time. The Court now understands that not all of the 145 yard removals scheduled for this year by agreement of the parties are technically "high risk" as that term is defined in the Consent Decree.

With only limited time available to complete the yard removals for this year and because it appears the Defendants acted in good faith based on their interpretation of the Court's order,[1] the Court is going to allow the Defendants to defer completion of the remediation on the remaining *non-high risk* properties scheduled for this year until further order of this Court. This decision is based on the fact there is no specific evidence presented that the public will face increased exposure by the deferral and that compliance may otherwise be impossible in light of the changing weather conditions.

The parties are urged to continue finalizing work plans for 2002 and the Defendants shall fully comply with all obligations under the Consent Decree for 2002 and beyond until further order of this Court. Should the evidence warrant a modification, it is evident from the estimated costs for work in 2002 – 2004 that the Court would have the flexibility it needs to make the modification without any money judgment being entered against the Plaintiffs.

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[1] The parties are advised potential misunderstandings related to the Court's orders should be brought to the attention of the Court as soon as possible instead of canceling contracts and making completion of the remaining yard remediations unlikely for 2001. The Court is always available by telephone to resolve matters that may affect public safety.

Being fully advised in the premises, the Court hereby orders that the Emergency Request for Clarification or Modification of the September 30, 2001 Order (Docket No. 99) is **GRANTED** consistent with this Order.

Dated this 15th day of October, 2001.

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and STATE OF IDAHO Plaintiffs, vs. ASARCO INCORPORATED; COEUR D'ALENE MINES CORPORATION; CALLAHAN MINING COMPANY; SUNSHINE PRECIOUS METALS; SUNSHINE MINING COMPANY, Defendants.	Case No. CV94-206-N-EJL **ORDER** (Filed Nov. 18, 2003)

Pending before the Court in the above-entitled matter are Hecla's and Asarco's Request for Final Relief on Motion to Modify Consent Decree (Docket No. 143) and Hecla's Notice of Judicial Appeal (Docket No. 155) regarding the Final Determination by the EPA of the Dispute Between Hecla and the EPA Concerning the 2003 Remedial Work Plan Under the 1994 Bunker Hill Consent Decree.

The parties have indicated the Court may rely on the affidavits filed with the briefing and have not requested a hearing on the matters. Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the

Court conclusively finds that the decisional process would not be significantly aided by oral argument, this matter shall be decided on the record before this Court without oral argument.

I. Request for Final Relief on Motion to Modify Consent Decree

A. Background Facts.

In an order dated September 30, 2001, this Court determined there had been "a significant change in factual circumstances [occurred since the Consent Decree concerning only the Box[1] was entered] and these changes were not reasonably anticipated by the Defendants at the time the Consent Decree was signed." The EPA's decision to expand the Superfund site to include the entire Cocur d' Alene Basin, instead of just the Box years after the Consent Decree was entered has exposed Defendants to a significant increase in liability. This Court reserved its decision on how to specifically modify the Consent Decree obligations until the Record of Decision ("ROD") on the Basin RI/FS was completed. The RI/FS has now been completed and the ROD estimates remedial cleanup at approximately $360-370 million. Additionally, this Court has ruled as to the liability of Hecla and Asarco in the CERCLA natural resources damages and Clean Water Act case. The amount of Asarco's and Hecla's liability will not be determined until the second trial in the natural resources case which is set for January 2005.

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[1] The "site" referred to in the Consent Decree is referred to as the "Box" by the parties and the Court, but such is more particularly described in the Site Description section of the Record of Decision dated August 1991 to be limited to a 21 square mile area.

Defendants seek the Court to modify the Consent Decree by eliminating any further liability under the Consent Decree. Plaintiffs continue to argue this Court erred in finding modification was applicable and ask that if a modification is allowed that it be limited to the costs the State of Idaho and EPA assumed for cleanup in 2002 of approximately $2.9 million. The question to be resolved by this Court is not have the burdens inside the Box increased, because the specific burdens for the Box have remained the same (although the cost of implementing the burdens has been higher than expected). Rather, this Court must determine to what extent the obligations under the Consent Decree should be modified based on the limited resources of the Defendants who now also have significant and real liability for the cleanup and restoration of the Basin.

As discussed in the Court's September 30, 2001 Order, the fact that costs have exceeded estimated costs is not a proper reason to modify the Consent Decree. However, the Court cannot determine the amount of modification that is appropriate without considering the monies spent to date and expected to be spent in the future for the Box and the Basin. It is undisputed that the estimated costs for clean up of the Box have been exceeded. Defendants have spent $44.7 million when the estimate for cleanup when the Consent Decree was entered was $40 million. Plaintiffs argue that they have spend [sic] $116 million in non-populated areas and such was estimated at $68 million when the Consent Decree was signed.

The Exhibit A to the Consent Decree is the Record of Decision dated August 1991 and it provides in part:

The residential soils remedy consists of the following:

- Removal of contaminated surficial soil
- Placement of a visual marker if lead in soil concentration exceed 1,000 ppm below the depth of excavation
- Replacement of clean soils (these soils will function as a barrier between residents and underlying contaminated material)
- Revegetation of yards
- Disposal of contaminated materials
- Dust suppression during remediation
- Institutional controls for barrier management
- Long-term environmental monitoring for evaluation of remedial effectiveness

A Remedial Action Objective is to decrease the concentration of lead such that 95% or more of the children in the area have blood lead levels below 10 ug/dL. This remedial action is expected to achieve community mean soil lead concentrations of approximately 200 to 300 ppm by removal of soils exceeding the threshold level of 1,000 ppm lead. Approximately 1800 residential properties will be remediated based on this criterion.

Defendants argue since this remedial blood lead level objective has been met, no further yard removals should be required under the Consent Decree. Plaintiffs maintain the work that has been completed has reduced the risks to human health and the environment and that the remedial actions provided for in the Consent Decree must be continued in order to achieve human safety and protection of

the environment. The Plaintiffs argue the remaining work under the Consent Decree consists of: remediating approximately 550 residential yards, certain commercial properties and rights of way along with certain outlying properties; implementation of the final remedy for the Page Pond; and implementation of the institutional control program. Plaintiffs estimate Defendants remaining responsibility under the Consent Decree to be $27 to $35 million dollars (present value).[2]

The Court finds there is important work that remains to be completed in the Box and that Defendants agreed to do such work. While it is true that a remedial objective of lowering blood lead levels appears to have been met, many yard cleanups still need to be completed in order to ensure that the overall blood lead levels remain within the targeted goal of 95% or more children in the area have blood lead levels below 10 ug/dL. Furthermore, the Court is convinced that based on the nature of the hazardous substances released by Defendants, an institutional control program (anticipated by the parties and provided for under the Consent Decree) needs to be established and barriers need to be constructed to ensure the long-term health and safety of the residents of this area.

When the Court indicated it would grant some relief to the Defendants based on the boundaries of the Superfund site being expanded to include the Basin, the Court had no intention of relieving the Defendants of all remaining liability under the Consent Decree. The requested

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[2] Defendants do not appear to disagree with this estimate based on Mr. Pfahl's estimate which includes another $18.1 million in remaining cleanup costs plus an additional $9-$17.7 million for the institutional control program.

relief by defendants is clearly overbroad. On the other hand, the requested modification by the EPA and the State of Idaho to limit the modification to the $2.9 million the Plaintiffs paid for remediation in 2002 to which they claim they are entitled to reimbursement from Defendants is too restrictive in light of the scope of cleanup costs for the Basin of $360 million. Asarco and Hecla's liability for the Basin is still unknown, however the Court can assume the Defendants' estimated PRP liability under the ROD for the Basin and the pending natural resource damages case will be significant.

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992) indicates that modification of a consent decree should be "suitably tailored to the changed circumstances." In this case, the Court finds a suitably tailored modification would be as follows:

Defendants Hecla and Asarco shall continue [sic] be bound under the 1994 Consent Decree except to the extent modified by the Court. Of the remaining work to be completed under the Consent Decree, the Court finds the Defendants' remaining obligations should be reduced by $7 million.[3] Asarco and Hecla remain jointly and severally liable for the costs under the Consent Decree.

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[3] The Court reached the reduction amount of $7 million as follows: the Defendants expected to spend $40 million when the Consent Decree was signed. To date, the Defendants have spent approximately $44.7 million. This is $ 4.7 more than they originally expected to spend. Additionally, the parties estimate the remaining costs (including the institutional control program) to be between $27 and $35 million. The Court used the middle of this range for an estimate of $31 million in work left to be completed. Adding $31 million plus the $4.7 million (amount spent over original estimate) is $35.7 million in obligations in excess of what Defendant's expected. The Court finds the Defendants'

(Continued on following page)

It is not the Court's intent that the EPA or the State of Idaho should have to write a check or checks to the Defendants. Nor should the Defendants have to wait until the expenditures are finalized (which is likely to be years in the future considering the long-term nature of the institutional control program) in order to have the reduction in liability implemented. Therefore, the Court respectfully requests the parties meet and confer as to where the reduction in liability will occur in light of the estimated remaining costs. For example, the reduction could occur via a reduction in yard removals by the parties identifying which particular pieces of real property will or will not be remediated by Defendants or the reduction could occur via a reduction in liability for the long-term institutional control program. The parties are in a much better position to determine the best method for achieving the Court's modification of the Defendants' liability that would equal $7 million. Finally, the parties cooperation and agreement is without prejudice for the purposes of an appeal.

The Court finds this limited, but tailored modification by the parties will allow for almost all of the required work to be completed while still achieving the goals necessary to safeguard and monitor human health and to protect the environment.

II. Hecla's Judicial Appeal of 2003 Work Plan

A. Background on Motion.

Hecla objects to the EPA's determination that 100 yards should be cleaned up when Asarco is only contributing $1.5

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remaining liability should be reduced by approximately twenty percent (20%). Twenty percent of $35.7 million is $7.14 million.

million towards the 2003 work plan and this results in Hecla having to pay $3 million under the 2003 work plan when historically Hecla and Asarco have shared equally the costs of the annual work plans. The Defendants agreed to submit work plans for the clean up of 200 yards per year. After negotiations, the EPA and State agreed the 2003 work plan could be reduced to 100 yards to be completed by Hecla and Asarco. The EPA and the Idaho Department of Environmental Quality (IDEQ) argue the remediation of 100 residential yards is consistent with the terms of the Consent Decree which make Hecla jointly and severally liable, so the fact that Asarco is only paying $1.5 million does not control the amount of work that has to be completed at Asarco and Hecla's expense.

Hecla complied with the Dispute Resolution section of the 1994 Consent Decree and EPA Director, Michael Gearheard, reviewed the matter and concluded the EPA and IDEQ were "properly within their authority in their decision to partially approve and partialy disapprove Hecla's Work Plan for the 2003 construction season, including their directive to Hecla to modify its work plan to provide for the remediation of 100 residential yards (including high risk yards) plus associated rights-of-way and commercial properties in the City of Wardner. I further find that the EPA and IDEQ were also properly within their authority in their April 30, 2003 decision to assume the remediation of a minimum of 100 residential yards." *See* Exhibits to Notice of Judicial Appeal, Docket No. 155.

B. Standard of Review.

Hecla argues for the decision by the EPA should not be entitled to record review or judged by the arbitrary and capricious standard while Plaintiffs argue EPA decision should be accorded record review.

The Consent Decree provides for formal dispute resolution. If the dispute "pertains to the selection or adequacy of any response action and all other disputes that accorded review on the administrative record under applicable principles of administrative law shall" be conducted pursuant to ¶ 69 of the Consent Decree. "[T]he adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by the EPA under this Consent Decree and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree." ¶ 69 of Consent Decree. "Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 69(a)." ¶ 69d.

Paragraph 70 is the formal dispute resolution for disputes "that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law."

The Court finds the dispute regarding the 2003 Work Plan and Hecla's financial responsibility for that plan are disputes under ¶ 69 of the Consent Decree as they relate to the adequacy and appropriateness of plans. Accordingly, the judicial review standard is administrative record review. The standard for reversing agency action as if the Court find the agency acted in a manner that

was "arbitrary, capricious, and abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 760(2)(A). The agency action is provided a presumption of administrative regularity. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). The Court may not substitute its judgment for that of the agency absent the Court finding the agency has acted "arbitrary, capricious, and abuse of discretion or otherwise not in accordance with the law."

C. Analysis.

On October 15, 2001, this Court issued an order indicating the 2002 work on "non-high risk" yards was deferred, but Asarco and Hecla were ordered to fully comply with all obligations under the Consent Decree until further order of this Court. Since that Order, Asarco has entered into a separate consent decree in Arizona which provides for Asarco to deposit over $100 million in an environmental trust ("Trust") for clean up costs related to numerous sites throughout the United States. For 2003, the Trust has allotted $1.5 million to support work required under the Consent Decree. Hecla claims the use of the Trust Funds violates the terms of the Consent Decree. The Court respectfully disagrees. The EPA and IDEQ are planning to supplement the Trust funds to support additional yard remediations. The net result is that the Trust, EPA and IDEQ will perform 50% of the work for yard remediations under the Consent Decree and Hecla is to perform the 50% balance of work under the Consent Decree.

The Consent Decree is not ambiguous. The Consent Decree clearly states the obligations are joint and several.

The failure of one party to complete its share of work, results in the remaining parties have the duty to complete the requirements under the Consent Decree. Hecla proposed remediation of 18 yards in 2003 is in contravention to the clean up it agreed to in the Consent Decree. Asarco's settlement negotiations do not impact Hecla's obligations.

The Plaintiffs agreed Hecla would not have to perform the 200 yard remediations required under the Consent Decree for 2003. The EPA decision to hold Hecla responsible for 50% of the 2003 work plan or 100 yard remediations is clean-up work legally required by the terms of the Consent Decree. In fact, under the terms of the Consent Decree, Hecla could be held responsible for the cost of all 200 yard remediations less the $1.5 million contribution by Asarco from the Trust. The Court finds Hecla's Notice of Judicial Appeal in this matter is without merit. The EPA decision on the dispute is not "arbitrary, capricious, and abuse of discretion or otherwise not in accordance with the law." The Court adopts as its own response, the well-reasoned EPA decision on the 2003 work plan.

ORDER

Being fully advised in the promises, the Court hereby orders:

1. Hecla's and Asarco's Request for Final Relief (Docket No. 143) is **GRANTED IN PART AND DENIED IN PART** consistent with this Order.

2. Hecla's Judicial Appeal (Docket No. 155) is **DENIED.**

ORDERED this 18th day of November, 2003.

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES
DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, and the STATE OF IDAHO, Plaintiffs, v. ASARCO INCORPORATED, COEUR D'ALENE MINES CORPORATION, CALLAHAN MINING COMPANY; HECLA MINING COMPANY; SUNSHINE PRECIOUS METALS, and SUNSHINE MINING COMPANY, Defendants.	Case No. CV94-206-N-EJL JOINT RECOMMENDATION AND ORDER (Filed Apr. 16, 2004)

COMES NOW, the United States, the State of Idaho, Hecla Mining Company and ASARCO, Inc. and in response to the Court's request of November 18, 2003 hereby submit this recommendation and proposed order.

1. On November 18, 2003, this Court issued an order modifying the Consent Decree that had been entered in this case in 1994 ("Order"). In the Order, the Court requested that the parties meet and confer in an attempt to "determine the best method for achieving the Court's modification of the Defendants' liability that would equal $7 million." The Court noted that "the parties cooperation and agreement is without prejudice for the purposes of an appeal." November 2003 Order at p. 6.

2. Pursuant to the Order, the parties have engaged in such discussions and, without prejudicing any appellate rights, hereby recommend that the Court modify the order so that it reflects that the $7 million in liability reduction be achieved as described below. All work referred to below relates to work to be performed in the Bunker Hill Superfund Site as defined in the Consent Decree.

- Defendants shall perform the clean-up of 160 yards plus associated rights-of-way and commercial properties in 2004 located in the geographical areas designated as Wardner, Elizabeth Park, Montgomery Gulch and Page;

- Plaintiffs intend to perform the clean-up of 40 yards plus associated rights-of-way and commercial properties in 2004;

- The first category of costs to be applied toward the $7 million are the response costs incurred by Plaintiffs in performing the clean-up of the above referenced 40 yards and associated rights-of-way and commercial properties;

- The second category of costs to be applied toward the $7 million are the costs incurred by EPA in performing oversight pursuant to the Consent Decree in 2004;

- The third category of costs to be applied toward the $7 million are the response costs incurred by EPA and the state in performing clean-up required under this Consent Decree in 2002 and 2003, less the $1.5 million paid by the ASARCO Environmental Trust and utilized by EPA to pay costs incurred in 2003.

- The fourth category of costs to be applied toward the $7 million are the response costs incurred by EPA in

performing oversight pursuant to this Consent Decree in 2002 and 2003; and,

- Should the first four categories referenced above not be sufficient to reach the $7 million, the remaining credit will be applied against EPA costs of oversight in 2005 or clean-up work performed by Plaintiffs in 2005.

3. The above recommendation is contingent upon amending the 2004 Annual Budget of the ASARCO Environmental Trust so that ASARCO may seek up to $1.5 million which shall be used to pay for fifty percent of the first $3 million in contractor response costs incurred by the Upstream Mining Group in the performance of the clean-up of the 160 yards. Should the 2004 Annual budget not be amended, the parties agree that this recommendation would be null and void and that further modification of the Order to address that issue would likely be necessary.

4. Defendants' obligations to pay the State of Idaho for its costs of oversight for 2004 or 2005 and pay Panhandle Health District for its costs of implementing the Institutional Control Program ("ICP") for 2004 or 2005 in accordance with the Consent Decree are not affected by this recommendation and order.

5. Defendants reserve all their rights under the Consent Decree to challenge EPA and State costs for work or oversight, including but not limited to, costs submitted by EPA or the State qualifying for credit hereunder.

Respectfully submitted,

FOR THE UNITED STATES

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SO ORDERED,

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, and STATE OF IDAHO, Plaintiff, v. ASARCO INCORPORATED; HECLA MINING COMPANY, Defendants-Appellees, and COEUR D'ALENE MINES CORPORATION; CALLAHAN MINING CORPORATION; SUNSHINE PRECIOUS METALS, INC.; SUNSHINE MINING COMPANY, INC., Defendants.	No. 04-35052 D.C. No. CV-94-00206-EJL District of Idaho, Boise ORDER (Filed Apr. 12, 2006)
UNITED STATES OF AMERICA, Plaintiff-Appellant, and STATE OF IDAHO, Plaintiff, v.	No. 04-35479 D.C. No. CV-94-00206-EJL

COEUR D'ALENE MINES CORPORATION; CALLAHAN MINING CORPORATION; SUNSHINE PRECIOUS METALS, INC.; SUNSHINE MINING COMPANY, INC.,

Defendants-Appellees.

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF IDAHO,

Plaintiff-Appellant,

v.

ASARCO INCORPORATED; HECLA MINING COMPANY,

Defendants-Appellees,

and

COEUR D'ALENE MINES CORPORATION; CALLAHAN MINING CORPORATION; SUNSHINE PRECIOUS METALS, INC.; SUNSHINE MINING COMPANY, INC.,

Defendants.

No. 04-35106

D.C. No. CV-94-00206-EJL

Before: FERGUSON, BEEZER, and McKEOWN, Circuit Judges.

The panel denies Defendant-Appellee's Petition for Rehearing.

Defendant-Appellee's Suggestion for Rehearing En Banc has been circulated to the entire court and no judge has asked for en banc rehearing. Judges Ferguson and Beezer recommend denying the Suggestion for Rehearing En Banc. Judge McKeown votes to deny the Suggestion for Rehearing En Banc. The Suggestion for Rehearing En Banc is rejected.

Federal Rule of Civil Procedure 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under *Rule 59(b)*; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of

a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in *Title 28, U.S.C. § 1655*, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

42 U.S.C. § 9601 Definitions

* * *

(25) The terms "respond" or "response" mean[3] remove, removal, remedy, and remedial action;,[4] all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

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42 U.S.C. § 9604 Response authorities

* * *

(c) Criteria for continuance of obligations from Fund over specified amount for response actions; consultation by President with affected States; contracts or cooperative agreements by States with President prior to remedial actions; cost-sharing agreements; selection by President of remedial actions; State credits: granting of credit, expenses before listing or agreement, response actions between 1978 and 1980, State expenses after December 11, 1980, in excess of 10 percent of costs, item-by-item approval, use of credits; operation and maintenance; limitation on source of funds for O & M; recontracting; siting

(1) Unless (A) the President finds that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a

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[3] So in original. Probably should be "mean".

[4] So in original.

timely basis, or (B) the President has determined the appropriate remedial actions pursuant to paragraph (2) of this subsection and the State or States in which the source of the release is located have complied with the requirements of paragraph (3) of this subsection, or (C) continued response action is otherwise appropriate and consistent with the remedial action to be taken[1] obligations from the Fund, other than those authorized by subsection (b) of this section, shall not continue after $2,000,000 has been obligated for response actions or 12 months has elapsed from the date of initial response to a release or threatened release of hazardous substances

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42 U.S.C. § 9605 National contingency plan

* * *

(c) Hazard ranking system

(1) Revision

Not later than 18 months after October 17, 1986, and after publication of notice and opportunity for submission of comments in accordance with section 553 of Title 5, the President shall by rule promulgate amendments to the hazard ranking system in effect on September 1, 1984. Such amendments shall assure, to the maximum extent feasible, that the hazard ranking system accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review. The President shall establish an effective date for

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[1] So in original. Probably should be followed by a comma.

the amended hazard ranking system which is not later than 24 months after October 17, 1986. Such amended hazard ranking system shall be applied to any site or facility to be newly listed on the National Priorities List after the effective date established by the President. Until such effective date of the regulations, the hazard ranking system in effect on September 1, 1984, shall continue in full force and effect.

(2) Health assessment of water contamination risks

In carrying out this subsection, the President shall ensure that the human health risks associated with the contamination or potential contamination (either directly or as a result of the runoff of any hazardous substance or pollutant or contaminant from sites or facilities) of surface water are appropriately assessed where such surface water is, or can be, used for recreation or potable water consumption. In making the assessment required pursuant to the preceding sentence, the President shall take into account the potential migration of any hazardous substance or pollutant or contaminant through such surface water to downstream sources of drinking water.

(3) Reevaluation not required

The President shall not be required to reevaluate, after October 17, 1986, the hazard ranking of any facility which was evaluated in accordance with the criteria under this section before the effective date of the amendments to the hazard ranking system under this subsection and which was assigned a national priority under the National Contingency Plan.

(4) New information

Nothing in paragraph (3) shall preclude the President from taking new information into account in undertaking response actions under this chapter.

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42 U.S.C. § 9613 Civil Proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

* * *

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

42 U.S.C. § 9622 Settlements

* * *

(d) Enforcement

(1) Cleanup agreements

(A) Consent decree

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to remedial action under section 9606 of this title, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain administrative settlements referred to in subsection (g) of this section, the agreement shall be entered in the appropriate United States district court as a consent decree. The President need not make any finding regarding an imminent and substantial endangerment to the public health or the environment in connection with any such agreement or consent decree.

GOVERNOR DIRK KEMPTHORNE
Testimony before an Environmental Protection Agency
hearing on the Coeur d'Alene Basin Cleanup
Wallace High School
November 13, 2001

Usually on occasions like this its not unusual for a Governor to be asked to make comments of welcome. Let me say tonight I come here to the Silver Valley to deliver a much different message.

That is I have become so frustrated with EPA that I'm on the verge of inviting the EPA to leave Idaho.

The bureaucracy of the EPA is absolutely non-responsive and we've had it. Absolutely had it. I hope the EPA will listen carefully to the testimony here tonight. Because I'm convinced that the good people of Idaho have the resources, the ability and the dedication to get the job done in our state if we would just have the EPA step aside.

If we can find collaboration, if we can find a way to work together, we stand ready in full partnership. Christie Todd Whitman, who is the Administrator of the Environmental Protection Agency, is a personal friend of mine, and I know her to be a great individual. She's very pragmatic. But once again there is a bureaucracy that seems to ignore any efforts at a solution. And I'm very serious when I say we have just about exhausted our patience with EPA.

The state, counties, cities and industry are partners and have a plan that makes sense.

It is time to assure the citizens of these communities that the talk is over and we will move ahead to execute a reasonable and a doable plan.

Judge Lodge, in federal court back in December of 2000, said that before we spend huge sums of money on litigation, that one last effort must be made to forget our differences and devise a plan that will meet all the requirements of the law, avoid irreparable harm to the parties and protect the economic interests of the business and people of North Idaho.

There you have a federal judge, whose courtroom is waiting, who said in 2000, 'don't bring this back to the courts. Settle this. Resolve this. Move forward.' And ladies and gentlemen, where are we today? We're in that courtroom, in front of that judge, litigating. Spending who knows how many thousands of dollars with attorneys litigating other attorneys. That's no solution, and it's been going on far too long.

Now, let me offer you some very definite views on your proposed action, and how we can accomplish what Judge Lodge said. I hope that your careful attention to these will result in a better plan – one that can be accomplished with less money, more certainty, less disruption and less intrusion into the lives of our citizens, more common sense, and, frankly, less federal presence for much less time.

My comments should not be news to EPA, because Director Allred of the Department of Environmental Quality has been offering this message for two years now.

Now it is time for you to put aside your hypothetical what-ifs and speculations about what might happen, take a hard look at the reality, logic and advantages of the State's position, and modify your plan accordingly.

My comments tonight are organized into three categories. The first category relates to the need for certainty; the

second for common sense; and the third outlines what we need for a course for the future.

The State of Idaho has consistently and fervently stated that a cleanup plan must provide certainty.

EPA's Proposed Plan presents an "Interim Action" as the recommended approach for cleanup. Far from providing certainty, it suggests that this thirty year, $359 million dollar plan is a mere first step in a process that continues far into the future.

Incredibly, you have identified Alternative 3 as the long-term cleanup alternative, in spite of the fact that the price tag – a whopping $1.4 billion dollars – cannot be funded even with the combined resources of Superfund, the mining companies, and the State of Idaho. How pragmatic is that?

Even worse, this alternative would provide, by your own estimation, only marginally better chances of reaching water quality standards over centuries of natural attenuation than your so-called "interim action." Well, as the saying goes . . . not in my house. So now, let me share with you the things you need to do to correct this:

• EPA must provide certainty by delineating the areas where remediation work will be done and where it will not be done. The local communities should not be listed as cleanup areas, but as areas where programs will be provided as a service to the communities.

• The Lake must not be included in the Superfund Site. We have a Lake Management Plan that will meet the environmental needs for the lake. We will continue to update and implement it.

• EPA must provide a schedule for cleanup, for how cleanup will be funded, and for when areas will be removed from Superfund, or as you say, de-listed. EPA must not put our citizens in a nightmare scenario where they are listed as a Superfund Site, but then not provided [sic] the resources to be de-listed.

• EPA's plan must provide certainty that cleanup areas will be available for future uses and provide opportunities for economic development.

Next, the cleanup plan for the Coeur d'Alene Basin must be based on common sense. Here's what EPA needs to do:

• EPA needs to balance the investment of resources with the severity of the problems. Blood lead monitoring has shown a great improvement this year. This is great news. We never want to have an Idaho child with an elevated blood lead level. But it is very important that we all recognize that we do not have a public health emergency in the Coeur d'Alene Basin. This is a completely different situation than we had at the Smelter Complex when the 1973 bag house fire caused huge releases of lead oxide in the environment. These releases combined with years of smelter operations resulted in average blood lead levels in children of 50 to 60 micrograms of lead per deciliter of blood. Our situation today is drastically different.

We're currently within one percent of meeting the CDC stated goal of no more than five percent of children over 10 micrograms.

Six percent of the children tested this year in the Coeur d'Alene Basin outside of the Box have blood lead levels above 10 micrograms with the highest level being 16

micrograms. As these positive trends continue we need to focus remediation efforts on a common sense approach.

Next, EPA's proposal to spend $86 million on Community and Residential Areas is a grossly disproportionate response to human health issues. We want our homes and recreation areas to be safe for all by implementing a system that:

• Gives people the right to make decisions about their own property through a voucher system for remediation using private contractors.

• Will empower health professionals to identify and remediate exposure sources and problems for children regardless of whether it is from soil, lead-based paint, drinking water or other source.

• Provides infrastructure improvements that will protect remediated areas from flooding and contaminant migration by improving storm drain systems and sewer systems.

• Balances risk management with the real identified threat. When you do that you will see that poverty is just as damaging to the health of our children as minimal exposures lead. EPA must recognize that economic improvement is as vital to improving human health as remedial action.

• EPA's plan also needs to make allowances for more information as it is developed regarding site-specific criteria for fish, bioavailability of different lead sources, and other new scientific information.

• And finally, common sense tells us that the local citizens must have a seat at the table for implementing any cleanup decision. The State of Idaho has taken the lead in

laying out a way to do that with the establishment of the Basin Environmental Improvement Project Commission. The EPA needs to join that commission. We sent a letter in May to the federal government inviting them to join, they say they are interested, but have never responded. How long does it take to give us the courtesy of an answer?

Last, I would like to provide you with a course for the future.

But I'd like you to think about something first, and that is, how did we end up where we are today?

The federal government is saying they want to come into the Silver Valley and provide environmental improvements. This should be something good for the citizens of the Valley.

But it is not generally seen that way. Instead, many see the Superfund program as an onerous burden leading to loss of jobs, over-statement of environmental problems, and inefficient use of taxpayer dollars.

We need to turn this around by making the cleanup project operate like a public works project. We need this proposed plan to be completely turned around so that remediation work is a service to the residents and not a mandate that forces people to do things that don't make sense. How? Here are few more things that should be done:

• Cooperate with our new Commission to give local contractors the opportunity to compete.

• Give citizens the right to make decisions about their own property and to create opportunities for new business developments. A right step in this direction is the privatized

cleanup program being developed by Director Allred and the DEQ. EPA should support this effort.

• Provide property owners the documentation they need to meet disclosure requirements for real estate transactions.

• Design cleanup activities so that they create future economic opportunities. This can be done by improving a community's infrastructure and by creating mechanisms so that businesses know the rules of how to conduct business.

• And finally, let's share the good news with the rest of the country of how this Valley – this Silver Valley – has made great strides in improving its environment and continues to do so.

The evidence is in. The Coeur d'Alene Basin is one of our nation's greatest treasures, and the environmental ghosts of the past no longer need to haunt us.

Let's do what the State has thoughtfully urged you to do, and adopt the State's approach to environmental cleanup in the Basin.

The State Plan is a very aggressive program which will manage the risks while providing certainty, common sense, and hope for the future. It is a plan that recognizes that we should be writing the last chapter of an incredible success story, not chapter one of a whole new tragedy.

Judge Lodge also said in December of last year that:

"While the Court strongly urges the parties to continue settlement negotiations, this Court will be prepared to commit significant judicial resources to this case in the new millennium. The Court only hopes this case does not

take an entire millennium to resolve the claims before this Court."

So to the EPA I say: Abandon your massive $1.4 billion plan. Join us, join the people of Idaho, in a common sense plan, and let's remediate the few areas that need some work. Let's do it in the right way, and declare our success. Our citizens need to get on with their lives.

Environmental Protection Agency
[LOGO] EPA

November 7, 1991

[Address Omitted In Printing]

Reply To
Attn Of: HW-113

Honorable Larry LaRocco
Representative in Congress
408 Sherman Avenue
Coeur d'Alene, Idaho 83814

Dear Congressman LaRocco:

This is in response to your letter dated October 28, 1991, regarding the Bunker Hill Superfund site in Shoshone County, Idaho.

In that letter, you expressed concern that the Environmental Protection Agency (EPA) involvement in area wide restoration efforts for the Coeur d'Alene River Basin might lead to an expansion of the Bunker Hill Superfund site. Let me state unequivocally that it is *not* EPA's intention to expand the boundaries of the site. We recognize that there are many other regulatory tools besides Superfund legislation to affect environmental improvements.

Since the Bunker Hill site is a major source of contamination to the Coeur d'Alene river, we believe that this cleanup should proceed on a parallel track with the development of the basin strategy. The Coeur d'Alene River basin strategy, along with educational and outreach efforts, embodies the use of appropriate local, state and federal regulatory authority and expertise to develop and implement an effective long-range management plan for the basin. I have confidence that by working together

these groups can provide the means for environmental restoration in the basin.

Thank you for your continued interest in this matter. If you have any further questions, please telephone us or have your staff contact John Meyer at (206) 553-1271.

Sincerely,

/s/ Dana A. Rasmussen
Dana A. Rasmussen
Regional Administrator

FOR IMMEDIATE RELEASE
FRIDAY, MARCH 22, 1996

ENR
(202) 616-2771
TDD (202) 514-1888

U.S. SUES EIGHT MINING COMPANIES FOR VAST ENVIRONMENTAL DAMAGE TO THE IDAHO PAN HANDLE

Coeur d'Alene River Basin Contaminated By Lead, Arsenic And Other Toxic Materials

WASHINGTON, D.C. – The United States sued eight companies today for extensive environmental damage caused by their mining operations in the Coeur d'Alene River Basin in northern Idaho. The cost of restoring the river and the surrounding area is estimated in the hundreds of millions of dollars.

The affected area, stretching over 1,500 square miles, is one of the largest contaminated areas the United States has ever sought to restore.

The complaint, filed in U.S. District Court in Boise, Idaho, alleges that more than 70 million tons of mine wastes have been discharged by the companies into the Coeur d'Alene River and its tributaries.

Through today's action, the United States seeks to restore an area contaminated by more than 100 years of mining and ore processing activities. The complaint alleges that the mining wastes, which have been deposited into the Basin by the companies, continue to seep into the soils and waters in the 1,500 square mile area, seriously injuring or destroying wildlife and vegetation. As a result, birds, fish and other wildlife and their habitats, along with federally managed lands, have been damaged.

The Department brought suit against:

- ASARCO Inc., based in New York, New York
- Hecla Mining Company Inc. of Coeur d'Alene, Idaho
- Sunshine Mining Company Inc. of Boise, Idaho
- Coeur d'Alene Mines Corporation a Coeur d'Alene, Idaho-based company
- and several affiliates of these companies (MORE)

"Our country's natural resources are a precious legacy that we must restore and manage for the benefit of future generations," said Lois J. Schiffer, Assistant Attorney General in charge of the Justice Department's Environment and Natural Resources Division. "It is critical that those who damage our environment with years of mining activity – not the American taxpayer – pay the clean up costs."

Bob Davison, the Department of the Interior Deputy Assistant Secretary for Fish and Wildlife and Parks, stated that "this case demonstrates the commitment of the Department of the Interior, in cooperation with the Department of Agriculture and the Coeur d'Alene Tribe, to restore the unique natural resources injured by the release of mining wastes in the Coeur d'Alene Basin."

To determine the costs needed to restore natural resources in the basin, the United States and the Tribe are jointly conducting a damage assessment. The assessment, which is due to be completed in 1997, is a process in which the agencies and the Tribe, with input from the public, collect and analyze scientific information to determine the extent of injuries to natural resources, and develop a plan for restoration of those resources. Through this assessment, the United States has determined that a variety of

resources in federal and tribal trusteeship have been, and continue to be, injured and destroyed by the mining wastes in the Basin.

In early 1991, the United States and the Tribe invited the defendants to cooperate in a joint damage assessment effort. It was the hope of the two governments that the joint effort would result in a resolution of the claims without litigation. None of the defendants responded to the government's requests.

The U.S. Department of Justice filed today's complaint on behalf of the U.S. Department of Agriculture, the U.S. Department of the Interior and the U.S. Environmental Protection Agency. The United States' lawsuit filed under the federal Superfund law and Clean Water Act, is similar to one filed by the Coeur d'Alene Tribe of Idaho, pending in the same court.

# # #

96-132

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and STATE OF IDAHO, Plaintiffs, v. ASARCO Incorporated, Coeur d'Alene Mines Corporation, Callahan Mining Corporation, Hecla Mining Company, Sunshine Precious Metals, Sunshine Mining Company, Defendants.	CIV 94-0206-N-HLR CIVIL ACTION NO. (Lodged May 10, 1994)

[BUNKER HILL CONSENT DECREE]

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February 11, 1994

* * *

AC. "Smelter Defendants" means Bunker Hill Properties, Inc; Bunker Hill Mining Company; Bunker Limited Partnership; Golconda Mining Company; Gulf USA Corporation; Highland Surprise Consolidated-Mining Company; Minerals Corporation of Idaho; Pintlar Corporation; Silver Bowl, Inc.; Stauffer Chemical Company; Syringa Minerals Corporation; Union Pacific Railroad and any other Bunker Hill potentially responsible parties named or to be named by the Environmental Protection Agency.

AD. The "Bunker Hill Superfund Site" or "Site" means an approximately twenty-one (21) square mile area in Shoshone County, Idaho, running approximately seven (7) miles in the east-west direction and approximately three (3) miles in the north-south direction as more accurately, delineated on Attachment C, the Bunker Hill Superfund Site Allocation Map, excluding any hazardous substances in the South Fork of the Coeur d'Alene River which flow into the Site;

AE. "State" means the State of Idaho;

AF. "Statement of Work" or "SOW" shall mean the document setting forth the Work, as set forth in Attachment B to this Consent Decree, and any modifications made in accordance with this Consent Decree;

AG. "Sunshine Precious Metals, Inc." "Sunshine Mining Company" or "Sunshine" means the Delaware corporations with those names.

AH. "Supervising Contractors" means the Settling Defendants or the principal contractors retained by the Settling

* * *

satisfactory performance of the De Minimis Defendants' obligations under this Consent Decree. These covenants not to sue extend only to the De Minimis Defendants and do not extend to any other person.

85. *United States' Pre-Certification Reservations*

Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to:

a. any right to institute proceedings in this action or in a new action, or issue an administrative order seeking to compel the Settling Defendants (1) to perform further response actions relating to Area I on the Allocation Map; or (2) to reimburse the United States for additional costs of response attributable to Area I on the Allocation Map, if, prior to Certification of Completion of a Remedial Action,

(i) conditions within Area I on the Allocation Map, previously unknown to EPA, are discovered, or

(ii) information, previously unknown to EPA, is received in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicate that that Remedial Action is not protective of human health and the environment. For purposes of this Paragraph, Settling Defendants agree to accept responsibility and liability within Area I on the Allocation Map for hazardous

substance releases existing as of the effective date of this Consent Decree attributable to the Smelter Defendants.

b. Except as otherwise provided in paragraph 85(a) or elsewhere in this Consent Decree, the Settling Defendants reserve all defenses they or the Smelter Defendants may have with regard to any actions taken by the United States under this Paragraph.

86. *United States Post-Certification Reservations*

Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to:

a. any right to institute proceedings in this action or in a new action, or issue an administrative order seeking to compel the Settling Defendants (1) to perform further response actions relating to Area I on the Allocation Map; or (2) to reimburse the United States for additional costs of response attributable to Area I on the Allocation Map, if, subsequent to Certification of Completion of a Remedial. Action,

(i) conditions within Area I on the Allocation Map, previously unknown to EPA, are discovered, or

(ii) information, previously unknown to EPA, is received in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicate that that Remedial Action is not protective of human health and the environment. For purposes of this Paragraph, Settling Defendants agree to accept responsibility and liability within Area I on the Allocation Map for hazardous

substance releases existing as of the effective date of this Consent Decree attributable to the Smelter Defendants.

b. Except as otherwise provided in paragraph 86(a) or elsewhere in this Consent Decree, the Settling Defendants reserve all defenses they or the Smelter Defendants may have with regard to any actions taken by the United States under this Paragraph.

87. *State of Idaho's Pre-Certification Reservations*

Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to any right it may have, jointly with, or separately from the United States, to institute proceedings in this action or in a new action pursuant to the State's authorities under Section 107 of CERCLA or applicable State law, including the Hazardous Waste Management Act, Idaho Code Section § 39-4401 *et seq.*, and, the Environmental Protection and Health Act, Idaho Code Section § 39-101 *et seq.*, seeking (1) to compel Settling Defendants to perform further response actions relating to Area I on the Allocation Map, or (2) to compel Settling Defendants to reimburse the State for additional costs of response attributable to Area I on the Allocation Map, if, prior to Certification of Completion of a Remedial Action,

(i) conditions within Area I on the Allocation Map, previously unknown to the State, are discovered, or

(ii) information, previously unknown to the State, is received in whole or in part,

and based on these previously unknown conditions or information together with any other relevant information indicate that that Remedial Action is not protective of

human health and the environment. For purposes of this Paragraph, Settling Defendants agree to accept responsibility and liability within Area I on the Allocation Map for hazardous substance releases existing as of effective date of this Consent Decree attributable to the Smelter Defendants.

b. Except as otherwise provided in paragraph 87(a) or elsewhere in this Consent Decree, the Settling Defendants reserve all defenses they or the Smelter Defendants may have with regard to any actions taken by the State under this Paragraph.

88. *State of Idaho's Post-Certification Reservations*

Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to any right it may have, jointly with, or separately from the United States, to institute proceedings in this action or in a new action pursuant to the State's authorities under Section 107 of CERCLA or applicable State law, including the Hazardous Waste Management Act, Idaho Code Section § 39-4401 *et seq.*, and, the Environmental Protection and Health Act, Idaho Code Section § 39-101 *et seq.*, seeking (1) to compel Settling Defendants to perform further response actions relating to Area I on the Allocation Map, or (2) to compel Settling Defendants to reimburse the State for additional costs of response attributable to Area I on the Allocation Map, if subsequent to Certification of Completion of a Remedial Action:

(i) conditions within Area I on the Allocation Map, previously unknown to the State, are discovered, or

(ii) information, previously unknown to the State, is received in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicate that that Remedial Action is not protective of human health and the environment. For purposes of this Paragraph, Settling Defendants agree to accept responsibility and liability within Area I on the Allocation Map for hazardous substance releases existing as of the effective date of this Consent Decree attributable to the Smelter Defendants.

b. Except as otherwise provided in paragraph 88(a) or elsewhere in this Consent Decree, the Settling Defendants reserve all defenses they or the Smelter Defendants may have with regard to any actions taken by the State under this Paragraph.

89. For purposes of Paragraphs 85 and 87, the information and the conditions known to EPA and the State shall include only that information and those conditions set forth in the RODs for the Site and the Administrative Record supporting the RODs. For purposes of Paragraph 86 and 88, the information and the conditions known to EPA and the State shall include only that information and those conditions set forth in the RODs, the Administrative Record supporting the RODs, and any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

90. *General reservations of rights.* Notwithstanding any other provision of this consent Decree; the covenants not to sue set forth above do not pertain to any matters other than those expressly specified in Paragraph 84. The United States and the State reserve, and this Consent Decree is without prejudice to, all rights against Settling

Defendants and De Minimis Defendants with respect to all other matters, including but not limited to, the following:

(1) claims based on a failure by Settling Defendants or De Minimis Defendants to meet a requirement under this Consent Decree;

(2) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site;

(3) liability for damages for injury to, destruction of, or loss of natural resources; including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release;

(4) liability for response costs that have been or may be incurred by any natural resource trustees;

(5) criminal liability;

(6) liability for violations of federal or state law which occur during or after implementation of the Remedial Action;

(7) liability for response costs incurred and/or response actions taken outside of the Site;

(8) liability for costs that the United States will incur related to the Site but are not within the definition of Future Response Costs; or

(9) liability for releases or threatened releases of hazardous substances resulting from activities of the Settling Defendants or De Minimis Defendants in or affecting the Site after entry of the Consent Decree.

91. In the event EPA, after consultation with the State, determines that Settling Defendants have failed to implement any provisions of the Work in an adequate or

timely manner, EPA or, upon request by EPA, the State, may perform any and all portions of the Work as EPA determines necessary. Settling Defendants may invoke the procedures set forth in Section XX (Dispute Resolution) to dispute EPA's determination that the Settling Defendants failed to implement a provision of the Work in an adequate or timely manner as arbitrary and capricious or otherwise not in accordance with law. Such dispute shall be resolved on the administrative record. Costs incurred by the United States or the State in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVII (Reimbursement of Response Costs).

92. Nothing in this Consent Decree constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States, including EPA, to seek or obtain further relief from the De Minimis Defendants, and the covenant not to sue in Section XXII, Paragraph 84(b) of this Consent Decree is null and void, if information not currently known to EPA is discovered which indicates that the De Minimis Defendants contributed an amount greater than five (5) percent of hazardous substances at the Site, or of toxic or hazardous effects greater than five (5) percent, so that the De Minimis Defendants no longer qualify as a de minimis party at this Site.

93. Notwithstanding any other provisions of this Consent Decree, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law.

XXIII. COVENANTS BY SETTLING DEFENDANTS

94. Except as limited in this paragraph, Settling Defendants and De Minimis Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States, the State or any Idaho county, city or local governmental entity with respect to the Site or this Consent Decree, including, but not limited to, any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 111, 112, 113, 42 U.S.C. §§ 9606(B)(2), 9611, 9612, 9613 or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Section 107 or 113 related to the Site, any claim against the State or any Idaho county, city or local governmental entity under CERCLA. Section 107 or 113 related to the Site or any claims arising out of response activities at the Site. However, the Settling Defendants and the De Minimis Defendants reserve, and

* * *

held or sponsored by EPA or the State to explain activities at or relating to the Site.

XXXII. MODIFICATION

112. Schedules specified in the SOW, RDRs and other deliverables for completion of the Work may be modified by agreement of EPA, in consultation with the State, and the Settling Defendants. All such modifications shall be made in writing.

113. No material modifications shall be made to the SOW and RDRs without written notification to and written approval of the United States, the Settling Defendants and the Court. Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW and the RDRs that do not materially alter those documents may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendants.

114. Nothing in this Decree shall be deemed to alter the Court's powers pursuant to Federal Rules of Civil Procedure 60, or otherwise.

XXXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

115. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice

* * *

United States General Accounting Office

GAO

Report to the Chairman, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Governmental Affairs, U.S. Senate

July 2003

SUPERFUND PROGRAM

Current Status and Future Fiscal Challenges

[LOGO] G A O

Accountability ★ Integrity ★ Reliability

United States General Accounting Office
Washington, D.C. 20548

July 31, 2003

The Honorable George V. Voinovich
Chairman
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

The Environmental Protection Agency (EPA) estimates that one in four Americans lives within 4 miles of a hazardous waste site. Congress established the Superfund program in 1980 to address the threats that these sites pose to human health and the environment Among the hazardous waste sites that the Superfund program addresses are manufacturing facilities where hazardous waste has been spilled or disposed of on site, waste disposal facilities where soil or groundwater has been contaminated, or sites where toxic materials have been

disposed of improperly and abandoned. EPA, which administers the Superfund program, has identified 44,000 potentially hazardous waste sites and continues to discover about 500 additional sites each year. EPA places the nation's most seriously contaminated sites, which typically are expensive and can take many years to cleanup, on its National Priorities List (NPL). At the end of fiscal year 2002, there were 1,233 sites on the NPL

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 established the Superfund program to clean up highly contaminated hazardous waste sites. CERCLA authorizes EPA to compel the parties responsible for the contamination to clean up the sites; allows EPA to pay for cleanups, then seek reimbursement from the responsible parties; and establishes a trust fund to help EPA pay for cleanups and related program activities. The law also authorizes states to participate in the cleanup process, provides for public participation in the cleanup decisions, and provides that responsible parties are liable for damage to injured natural resources. In addition, the law establishes a process for cleaning up hazardous waste at federal facilities, although the Superfund trust fund is generally not available to fund these federal cleanups, which are funded from federal agency appropriations.

States and responsible parties play a significant role in the cleanup of hazardous waste sites. Most states have established their own programs to

* * *

Although the law allows EPA to pay for the cleanup at a site and use enforcement actions to recover the cleanup

costs, responsible parties frequently cooperate with EPA and conduct the cleanup under EPA oversight. In such cases, the responsible party pays for all or part of the cleanup. According to EPA, responsible party involvement in the program remains strong, and the total value of responsible party commitments since the inception of the program exceeds $20 billion.[5] The actual dollar amount that responsible parties expend for site cleanups is unknown because the parties are not required to publicly report either the cleanup or any related transaction costs they incur. However, EPA tracks the participant – EPA, the responsible party, a federal agency, or in some limited cases, the state – leading a cleanup action at a site and indicates whether the participant is providing a majority of the funding for the action. For example, if a remedial action is identified as a Superfund lead action, EPA uses annual Superfund appropriations to conduct the work and pay for the remedial action. Over the course of a cleanup, however, a variety of participants may take the lead on different actions. Table 3 demonstrates the percentage of actions led by EPA, a responsible party, or another participant.

[5] Commitments include the value of cost recoveries and EPA's estimate of the value of the cleanup work that responsible parties have agreed to perform.

Table 3: Percentage of Ongoing Actions at NPL Sites Led by Various Entities, Fiscal Year 2002

	Preconstruction			Construction	Post-construction
Entity leading action	**Site Inspection**	**Remedial Investigation and study**	**Remedial design**	**Remedial action**	**Operation and maintenance***
EPA-Superfund	100	27	36	22	18
Responsible party	0	17	39	45	67
Other federal agency	0	54	24	31	10
Other	0	2	0	2	5

Source: GAO analysis of EPA date.

Notes: This presentation of lead data includes all actions that were ongoing at some point during fiscal year 2002. EPA typically presents lead data as a percentage of remedial actions that start in a

* * *

The Superfund Program Faces Numerous Future Fiscal Challenges

The need for federal cleanup funds to address sites without alternative funding sources may grow in coming years, even as EPA predicts the program's historical source of funding will be depleted at the end of fiscal year 2003. A 2001 study estimated that the cost of implementing the program under then-current law would total $15 billion for the 10 years ending in fiscal year 2009. The number of sites whose cleanup cannot be funded by responsible parties or states could increase because an increase in bankruptcies would lead to more sites without viable responsible parties and states face budget problems that will curtail their already limited ability to pay for cleanups at sites that lack viable responsible parties. Without responsible parties to fund remediation costs at hazardous waste sites and with states' capacity curtailed, federal funding would likely be sought to perform any cleanup that EPA proposed to do. However, EPA officials expect that the balance of the Superfund trust fund available for future appropriations will be depleted at the end of fiscal year 2003. EPA has recently asked an advisory council for guidance on several issues affecting the Superfund program's future. Because Superfund lacks indicators to fully measure the outcomes of the program's cleanup efforts, EPA has asked the advisory council to develop criteria by

which to measure the program's progress. However, it is unclear whether the advisory council will reach consensus on its recommendations; and its findings are not expected until December 2003, at the earliest.

The Number of Sites Without Responsible Parties or States to Fund Their Cleanup Is Expected to Rise

The number of sites that have no identifiable nonfederal source to fund their cleanup is growing, and several factors indicate the potential for additional growth in the future. Responsible parties and EPA lead most actions at NPL sites. According to EPA, responsible parties have funded about 70 percent of the remedial actions begun at sites other than federal facilities in the last 3 fiscal years.[8] Officials in 7 of the 10 EPA regions, however, have either observed an increase in the number of sites without viable responsible parties, or expect such an increase in the future. Officials in one region, for example, told us that the proportion of responsible party-led remedial actions in their region had decreased over the last 10 years, from about 70 percent to about 50 percent currently. Officials in all regions pointed out factors that could lead to an increase in sites in the coming years whose cleanup cannot

[8] EPA tracks lead statistics based on new starts of remedial actions at sites other than federal facilities by fiscal year. Federal facilities, sites whose cleanup is led by federal agencies, make up about 13 percent of NPL sites.

be funded by responsible parties or states, including (1) the states' preference to work directly with viable responsible parties, which leaves fewer sites with viable responsible parties eligible for proposal to the NPL; (2) an increase in sites that lack viable responsible parties due to bankruptcies; and (3) fiscal constraints on states' capacity to clean up sites on their own. For example, officials in one region mentioned that difficult economic times would likely contribute to an increase in bankrupt facilities at the same time that states are experiencing budget shortfalls. Without responsible parties to fund remediation costs at hazardous waste sites and with states' capacity curtailed, any cleanup at these sites would have to be funded with federal funds.

The states' preference to work directly with responsible parties makes sites with viable and cooperative responsible parties less likely to be listed on the NPL, increasing the potential need for federal funds if any of the remaining sites that are added to the NPL are to be cleaned up, since these sites may lack viable responsible parties. When Congress enacted the federal Superfund program in 1980 at least 21 states did not have cleanup statutes that provided them with enforcement authorities. As of 2001, all states had laws that provide them with some form of enforcement authority, and 48 states had statutory

authority for conducting voluntary cleanup programs, according to a study by the Environmental Law Institute – an environmental research group.[9] Officials in most of the 10 states we contacted agreed that they preferred to work with viable and cooperative responsible parties under their state program, rather than turn the sites over to the EPA for NPL listing. They provided a variety of reasons for not supporting a site's listing on the NPL, including the state's ability to perform the cleanup faster, community or political opposition to listing, and a belief that the federal process leads to more expensive cleanups. For example, one state's officials believed the state could perform a site's cleanup more quickly than EPA because, in their opinion, EPA spent too much time in the inspection and design phases. Although states may sometimes need EPA's enforcement capacity to compel responsible parties to clean up sites, states prefer working with responsible parties under their own authority whenever the parties are available, viable, and cooperative. As a result, some sites that would have been led by the responsible party under the Superfund program are addressed using state enforcement. This

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[9] Environmental Law Institute, *An Analysis of State Superfund Programs: 50-State Study, 2001 Update*, (Washington, D.C.: 2002).

* * *

Progress Toward Implementing

SUPERFUND

Fiscal Year 1998

REPORT TO CONGRESS

Required by
Section 301(h) of the
Comprehensive Environmental Response,
Compensation and Liability Act (CERCLA) of 1980,
as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986

OFFICE OF EMERGENCY AND REMEDIAL RESPONSE
U.S. ENVIRONMENTAL PROTECTION AGENCY

* * *

Progress Toward Implementing SUPERFUND
Fiscal Year 1998

The Agency announced the Brownfields Action Agenda in January 1995 and it has grown to encompass many aspects of site redevelopment. During FY98, Brownfields pilots focused on clarifying liability and cleanup issues, partnership and outreach, and job development. By the end of FY98, 227 Brownfields pilots were awarded, in values of up to $200,000 each. These pilots encourage federal, state, and local governments as well as tribes to implement new strategies aimed at increasing the level and efficiency of site assessment, cleanup and redevelopment.

Removal Progress

To protect human health and the environment from immediate or near-term threats, the Agency and PRPs started 324 removal actions and completed 289 during FY98. More than 4,814 removal actions have been started and 4,228 have been completed since the inception of the Superfund program.

Through the Superfund Accelerated Cleanup Model (SACM), the Agency continued its efforts to expand the use of removal authority for early actions to reduce risks more rapidly and expedite cleanup at NPL sites. Early actions may include emergency, time-critical, or non-time-critical removal responses, or quick remedial responses. Accelerated cleanups are targeted with other initiatives as well, including those on presumptive remedies, dense non-aqueous phase liquid (DNAPL) contamination, and soil screening levels.

Remedial Progress

Remedial progress during the fiscal year reflects the Agency's continuing efforts to accelerate the pace of cleanup activities and complete cleanups at Superfund sites. As mentioned previously, by the end of FY98, remedial work had occurred at 98 percent of the 1,436 sites proposed to, listed on, or deleted from the NPL, and construction activities had been completed to place 585 NPL sites (41 percent) in the construction completion category. During the year, the Agency and PRPs started nearly 40 remedial investigation/feasibility studies (RI/FSs), 73 RDs, and 100 RAs. EPA also signed 173 records of decision (RODs) for Fund-financed and PRP-financed sites.

In continuing efforts to encourage the development and use of innovative treatment technologies to cleanup Superfund sites, the Agency took measures to demonstrate the technologies and provide information about them to potential users.

Enforcement Progress

Enforcement progress for FY98 reflects the Agency's continued commitment to maximize PRP involvement in financing and conducting cleanup, and to recover Superfund monies expended for response actions. During FY98, EPA reached 203 settlements with PRPs worth more than $806 million in PRP response work. Through its FY98 cost recovery efforts, EPA achieved $230 million in cost recovery settlements and collected more than $320 million for reimbursement of Superfund expenditures.

Many of the enforcement initiatives undertaken in FY98 were designed to encourage redevelopment of contaminated sites. EPA also continued to build upon prior Administrative Reform successes, particularly in the unilateral administrative order (UAO), Allocation, PRP Oversight, Special Interest Bearing Account, *De Minimis* Settlement, and Orphan Share Compensation reforms. These reforms are designed to make Superfund a fairer program, while reducing transaction costs to promote effective and efficient settlements. Examples of significant enforcement actions are provided in Chapter 4 of this Report.

Federal Facility Cleanups

Federal departments and agencies are largely responsible for implementing CERCLA at federal facility sites. To ensure federal facility compliance with CERCLA requirements, EPA provides advice and assistance, oversees activities, and takes enforcement action where appropriate. For sites on the NPL, EPA must concur in remedy selection.

Activity during the fiscal year at federal facility sites listed on the NPL, included starting 31 RI/FSs and 61 RAs; and signing 77 RODs. Ongoing activities at the end of FY98 included 497 RI/FSs, 71 RDs, and 206 RAs. Of the 2,104 sites listed on the June 27, 1997 Federal Agency Hazardous Waste

* * *

Exhibit ES-4
Fiscal Year 1998 Superfund Initiatives

Superfund Initiative	Status
Protect Public Health and the Environment	
Construction Completions	The President set a goal of 900 construction completions by the end of calendar year 2000. EPA stressed the importance for states and Regions to work together to determine opportunities to expedite completions and response actions. The Superfund federal facilities program ensured that federally-owned sites are likewise working toward construction completeness by emphasizing regional efforts.

Innovative Technologies	EPA's efforts to develop environmental technologies and commercialization led the Agency to build new relationships with the private sector. The new funding partnerships allow for better directed research opportunities and more joint demonstration projects. EPA committed to increasing information dissemination through electronic information resources, and has a number of Internet-based mechanisms to help achieve this goal.
Promoting a Fundamentally Fairer Superfund Program	
Reducing Oversight for Capable and Cooperative PRPs	Some responsible parties have gained considerable experience in conducting response activities at sites. In situations where the PRP is and has been cooperative and capable, EPA reduced its oversight, while maintaining high quality response actions. -
Alternative Dispute Resolution	Alternative Dispute Resolution (ADR) employs techniques designed to reduce the cost of settlement actions. Increased use of ADR helped PRPs incur lower transaction costs than those associated with litigation.
Interest Bearing Special Accounts	Special accounts are created when PRPs settle their liability, allowing a payment that can accrue interest to be used toward future response costs. EPA may use the revenue to pay for EPA-led response actions, defray costs incurred at PRP-led sites, or to help pay the costs of PRP-led responses.

Enforcement First/Cost Recovery	EPA continued to emphasize early initiation of PRP searches, negotiations binding PRPs to lead cleanup activities, maximizing PRP response leads, addressing timely cost recovery at sites with costs more then $200,000, and monitoring compliance violations. In the past few years, PRPs have led the majority of new remedial actions, accelerating the pace of Superfund cleanups. Early involvement of PRPs also kept transaction and cleanup costs at a minimum.
Orphan Share Compensation	EPA assisted PRPs that are financially insolvent to help ensure that the remaining PRPs are not responsible for contributing more than their fair share of the site remediation cost.
"De Micromis" Settlements	The threshold amount of waste a small contributor may be held liable for doubled. EPA decreased transaction costs and avoided "third-party" suits from larger contributors by pursuing fewer "de micromis" parties.

S. HRG. 109-181

A REVIEW OF FEDERAL CONSENT DECREES

HEARING
BEFORE THE
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED NINTH CONGRESS
FIRST SESSION

JULY 19, 2005

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* * *

[97] **Testimony of Lois J. Schiffer**

Before Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
July 19, 2005
"A Review of Federal Consent Decrees"
On S. 489, the Federal Consent Decree Fairness Act

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My name is Lois Schiffer and I appreciate the opportunity extended to me by members of this Subcommittee to offer my views on S. 489, described as the Federal Consent Decree Fairness Act.

I am currently a lawyer in private practice at the Washington, D.C. law firm of Baach Robinson & Lewis PLLC. From 1994-2001, I was the Assistant Attorney General in charge of the Environment and Natural Resources Division in the United States Department of Justice. There, I was responsible for federal litigation related to pollution, public lands and natural resources, wildlife, condemnation and inverse condemnation, and certain Indian cases. With the United States Attorneys Offices, this Division handles all federal litigation related to enforcement of laws protecting against pollution. Formerly, I worked in the Division from 1978-1984. I have also taught environmental law for 20 years as an adjunct professor at Georgetown University Law Center, and for a semester as a Lecturer at Harvard Law School.

I have had extensive experience with consent decrees to fix environmental problems. Indeed I have approved and signed *hundreds of environmental consent decrees*, and have personally negotiated many of them. That experience came primarily from my work at the U.S. Justice Department where, as Assistant Attorney General, I was responsible for supervising 700 people (400 lawyers) with cases in every federal court in the country, and some state courts as well. With the United States Attorneys, we were responsible for *all* environmental enforcement and defense litigation – both civil and criminal – on behalf of the Environmental Protection Agency, the Department of the Interior, the Department of Defense, and every other federal agency. The docket of the Division was over 10,000 cases at a time. We handled cases arising under over 100 federal statutes. The consent decrees I have approved obligate companies to undertake Superfund cleanups costing hundreds of millions of dollars; obligate local sewer authorities to put in new sewage treatment and collection systems to the tune of many millions of dollars and many years of work to protect public health; obligate companies to develop new diesel engines to comply with the Clean Air Act; and require cleanup of major river systems. I have approved many consent decrees that would be stabbed in the heart by S. 489.

[100] S. 489 would have a serious impact not only on resources of state and local lawyers, but also on federal courts, and on the justice system generally. With courts under heavy burdens and pressures to expedite a wide range of cases, including criminal cases subject to speedy trial requirements of the Constitution and U.S. law, seriously reducing or effectively eliminating an important settlement tool will interfere with the administration of

justice in this country. It is certainly an approach at odds with the federal Alternative Dispute Resolution Act of 1998, 28 U.S.C. §651 et seq. Under that law, every federal court in the country now has an alternative dispute resolution program geared to encourage parties to settle. Every federal circuit court has an alternative dispute resolution program too, and those programs are key to reducing court caseloads. As Judge Jones' testimony so eloquently notes, most federal judges would be extremely dismayed by the bill.

Third, settling environmental cases with consent decrees provides far more *flexibility* to the parties in establishing what the state or local government must do to come into compliance with the environmental law. The parties, rather than the court, set the schedule. Each party compromises to come up with a more workable solution than a judge-decided ruling may provide. Moreover, a component of consent decree flexibility is that consent decrees can be modified. While both court-established remedies and consent decrees may be modified, courts may well be more willing to change an order not crafted by the judge. With consent decrees, there are effective tools for dealing with *changed circumstances*, including changed financial circumstances, in a state or local government. *Frew v. Hawkins*, 540 U.S. 431 (2004), decided by the U.S. Supreme Court in 2004, underscores those tools. The Court specifically states that courts must understand that state officials must be given flexibility in carrying out their responsibilities. For example, in the case of a consent decree to provide for restoring the Everglades in Florida with work covering many years, the parties agreed to seek a modification as circumstances changed. In the consent decree that requires the City of

New York to build a drinking water filtration plant to comply with the Safe Drinking Water Act so that New Yorkers will have safe water to drink for years to come, the decree has been modified several times to extend the schedule. In the case requiring Wayne County (Detroit) to upgrade its sewer system, after the County completed fixing the system the consent decree was recently terminated. Each of these cases is described more fully below.

Fourth, in many environmental laws, Congress has explicitly provided that enforcement actions may be brought by private parties. These "citizen suits" are a critically important component of assuring effective enforcement of our nation's environmental laws, and of securing for the American public clean water, clean air, and clean land. Most of the sewage treatment cases described below were initiated by community groups as citizen suits, then the United States intervened and became actively involved. Many of these citizen groups have extensive experience with these laws, and of working with state and local governments, and a sound understanding of what Congress intended in enacting the laws and what ways work to get state or local governments to meet their obligations under the laws. Yet citizens often have limited resources. The provisions of S. 489, which that effectively eliminate use of consent decrees to solve problems, would gravely impair the important role that Congress has recognized for citizen suits in the enforcement of environmental laws.

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SUPREME COURT, U.S.

No. 06-61

In the Supreme Court of the United States

HECLA MINING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the district court abused its discretion in modifying a consent decree when the terms of the decree show that the parties anticipated the circumstance that prompted the motion to modify, and petitioner failed to satisfy its burden of justifying such a modification.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 430 F.3d 972. The orders of the district court (Pet. App. 23a-35a, 36a-38a, 39a-50a, 51a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2005. A petition for rehearing was denied on April 12, 2006 (Pet. App. 56a-58a). The petition for a writ of certiorari was filed on July 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42

U.S.C. 9601 *et seq.*, authorizes the President to respond to releases of hazardous substances, pollutants, or contaminants by undertaking "removal" and "remedial" actions. 42 U.S.C. 9604(a)(1). "Removal actions" are actions to monitor, assess, evaluate, minimize, or mitigate danger to public health or the environment that may result from a release of hazardous substances. 42 U.S.C. 9601(23). "Remedial actions" are actions consistent with a permanent remedy taken instead of or in addition to removal actions. 42 U.S.C. 9601(24). Removal and remedial actions are both "response actions." 42 U.S.C. 9601(25).

Before a remedial action is selected, the Environmental Protection Agency (EPA) generally conducts a remedial investigation and feasibility study (RI/FS). 40 C.F.R. 300.430. Once the RI/FS is completed, EPA selects a remedial action in a Record of Decision. When the federal government has used Superfund money to implement a response action, the United States may bring an action against potentially responsible parties (PRPs) to recover the government's costs. 42 U.S.C. 9607(a).

2. For many years, EPA and the State of Idaho have made concerted efforts to clean up the Coeur d'Alene River Basin (Basin) in northern Idaho. Pet. App. 3a-8a. One area of particular concern has been a 21 square-mile area of the Basin known as "the Box." *Id.* at 3a.

In 1994, the United States and the State entered into a consent decree with various mining companies, including petitioner, requiring the mining companies to perform cleanup activities in the Box. Pet. App. 3a. In the Decree, the United States preserved its authority to sue the mining companies for liability outside the Box; it retained all authority to take any and all response

actions authorized by law; and it granted a covenant not to sue the mining companies, but only with respect to the Box. *Id.* at 7a.

During negotiations, EPA informed the mining companies that its current plan was not to use its CERCLA remedial authority outside the Box. Pet. App. 6a. Instead, EPA intended to address clean-up outside the Box through the Coeur d'Alene Basin Restoration Project (Basin Restoration Project), a long-term cooperative venture involving a wide range of participants, including the mining companies. *Id.* at 6a-7a. During negotiations, petitioner "consistently sought a binding commitment" from EPA that it would not exercise CERCLA remedial authority outside the Box. *Id.* at 27a. The United States "consistently rejected such broad relief," however, and such a provision was not included in the Decree. *Ibid.*

3. In 1998, EPA announced that it would exercise its CERCLA remedial authority to conduct an RI/FS for the areas outside the Box. Pet. App. 8a. In 2001, petitioner filed a motion to modify the Decree on the ground that EPA's decision to invoke CERCLA remedial authority outside the Box was an unanticipated change in circumstance that made compliance with the Decree more onerous. *Ibid.*

After a hearing, the district court granted petitioner's motion to modify. Pet. App. 23a-35a. The court held that the Decree clearly and unambiguously reserved to the EPA authority "to apply remedial CERCLA authority outside the Box and hold the potentially responsible parties ('PRPs') liable for alleged injury outside the Box." *Id.* at 27a. Relying on statements by EPA that it intended to use the Basin Restoration Project to address contamination outside the Box,

however, the court concluded that the United States' assertion of CERCLA remedial authority was an unanticipated change in circumstances warranting modification of the Decree. *Id.* at 27a-28a. In a later order, the court concluded that the petitioner's and Asarco's joint obligation under the Decree should be reduced by $7 million. *Id.* at 44a.

4. The court of appeals reversed. Pet. App. 1a-22a. Applying this Court's decision in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the court of appeals held that petitioner failed to satisfy the applicable standards for modifying a consent decree. In particular, the court held that (1) petitioner anticipated that EPA might use its CERCLA authority outside the Box, Pet. App. 13a-20a, and (2) petitioner failed to satisfy the heavy burden that applies to a party seeking a modification based on an anticipated circumstance. *Id.* at 20a-22a.

In holding that petitioner anticipated the possibility that the EPA would use CERCLA remedial authority outside the Box, the court of appeals relied on the plain language of the Decree. Pet. App. 13a. In particular, the court referred to the provision in the Decree expressly stating that the United States "retain[ed] all authority and reserve[d] all rights to take any and all response actions authorized by law." *Ibid.* (brackets in original).

The court of appeals rejected petitioner's effort to show, based on extrinsic evidence, that it did not anticipate EPA's reliance on CERCLA authority outside the Box. Relying on this Court's decision in *United States* v. *Armour & Co.*, 402 U.S. 673 (1971), the court of appeals held that extrinsic evidence is not relevant when, as here, the terms of a consent decree unambiguously

resolve an issue. Pet. App. 14a-15a. The court further concluded that, in any event, the extrinsic evidence did not support petitioner's argument. *Id.* at 19a-20a. The court explained that the evidence showed that EPA relayed only its present intent not to use CERCLA authority, and that EPA never gave any assurances that it would not use such authority in the future. *Ibid.*

The court of appeals further held that petitioner failed to satisfy the heavy burden that applies under *Rufo* when a party seeks a modification of a decree based on an anticipated circumstance. Pet. App. 20a-22a. The court noted that petitioner relied on an assertion that EPA's use of CERCLA authority significantly affected its financial position. *Id.* at 22a. The court concluded that petitioner's claim of financial harm was speculative because it is unclear what liability petitioner faces compared to what it would have faced under the Basin Restoration Project. *Ibid.*

ARGUMENT

The court of appeals' decision is correct. It does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 18) that the decision below conflicts with this Court's decision in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). That contention is without merit and does not warrant review.

In *Rufo*, the Court held that, in general, a district court has flexibility to modify a consent decree in response to a significant change in circumstances. 502 U.S. at 383. At the same time, however, the Court made clear that "[o]rdinarily, * * * modification should not be granted where a party relies upon events that actually

were anticipated at the time it entered into a decree." *Id.* at 385. The Court specifically held that when a party seeks a modification based on a circumstance that was anticipated when the decree was entered, that party "would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." *Ibid.*

Thus, under *Rufo*, the applicable modification standard depends on whether the circumstance upon which the party relies in seeking a modification is anticipated or unanticipated. If the change is unanticipated, a district court has discretion to modify the decree provided that the change is significant. On the other hand, if the change is anticipated, a modification would be warranted only if the party seeking a modification satisfies a "heavy burden" of showing that it should be relieved of the undertaking to which it agreed.

The court of appeals followed the approach required by *Rufo* here. It first determined that the change in circumstance on which petitioner relied—EPA's invocation of CERCLA remedial authority outside the Box—was anticipated. Pet. App. 13a-20a. It then determined that petitioner failed to satisfy the heavy burden of showing that it should nonetheless be relieved of the obligation to which it agreed. *Id.* at 20a-22a. Those rulings are fully consistent with *Rufo*.

2. Petitioner contends (Pet. 18-21) that the court of appeals erred in ruling that the parties anticipated that EPA might invoke its CERCLA remedial authority outside the Box. The court of appeals' ruling, however, is supported by the plain language of the Decree. The Decree expressly authorizes EPA to bring an action against the defendants for "liability for response costs in-

curred and/or response actions taken outside of the [Box]." Pet. App. 88a. The Decree also preserves EPA's authority to "take any and all response actions authorized by law." *Id.* at 89a. And nothing in the Decree places any limitation of EPA's authority to take remedial action outside the Box. To the contrary, petitioner conceded below that EPA retained the right "to exercise CERLCA authorities outside the Box," and that "the Decree's reservation of rights confirms the parties' expectation that the EPA *might* take such action." *Id.* at 13a. In those circumstances, the court of appeals correctly concluded that the terms of the Decree make clear that the parties anticipated that EPA might invoke its CERCLA remedial authority outside the Box. In any event, the question whether the court of appeals correctly interpreted the particular Decree in this case is not one of recurring importance, and therefore does not warrant review.

Petitioner contends (Pet. 18) that the court of appeals erred in resolving the question whether the parties anticipated EPA's invocation of CERCLA remedial authority based solely on the terms of the decree. In petitioner's view, the court should have considered certain statements made by EPA to petitioner. Petitioner's arguments are without merit. The court of appeals' approach is consistent with this Court's decisions in *United States* v. *Armour & Co.*, 402 U.S. 673 (1971), and *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975). Under those decisions, a court must interpret the meaning of a consent decree based on its language, and it may consult extrinsic sources only when the language in the decree is ambiguous. *Armour*, 402 U.S. at 682-683; *ITT*, 420 U.S. at 238. There is no reason that the same approach should not govern the question

whether the parties anticipated a particular circumstance when they entered into a consent decree.

Here, as discussed above, the language of the Decree unambiguously shows that the parties anticipated the possibility that EPA would invoke CERCLA remedial authority outside the Box. The court of appeals therefore correctly based its determination on the language of the Decree without consideration of extrinsic evidence.

Petitioner argues (Pet. 18-19) that the court of appeals' holding that the unambiguous language of a decree may not be contradicted by extrinsic evidence conflicts with *Rufo*. But *Rufo* simply did not address that issue. In those circumstances, the court of appeals properly followed the guidance provided by this Court's decisions in *Armour* and *ITT*.

The court of appeals' holding is also consistent with that of the only other circuit that has addressed the question. In *Thompson* v. *United States Department of Housing & Urban Development*, 220 F.3d 241 (4th Cir. 2000), the district court modified a decree that required the building of housing in certain areas based on the asserted need for the housing in another area. The Fourth Circuit reversed, explaining that a provision in the decree "makes it clear that the parties contemplated that new construction would be required or desired during the life of the Consent Decree." *Id.* at 247. No other circuit has taken a contrary view.

Petitioner errs in contending (Pet. 19) that the decision below conflicts with the decisions of other circuits. In *Building & Construction Trades Council* v. *NLRB*, 64 F.3d 880, 889 (1995), the Third Circuit assumed arguendo, based on an affidavit submitted by the party seeking a modification, that the party had not violated

the consent decree. It went on to hold that compliance with a consent decree is not a sufficient basis for obtaining a modification of a decree. *Ibid.* In *Alexis Lichine & Cie* v. *Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 584 (1995), the First Circuit noted that the district court had held a four-day hearing on the motion to modify. The court concluded that most of the evidence was not relevant to the question whether a modification was warranted. *Id.* at 587. In *Waste Management of Ohio, Inc.* v. *City of Dayton*, 132 F.3d 1142, 1146 (1997) (citation and emphasis omitted), the Sixth Circuit held that a court is not "bound under all circumstances by the terms contained within the four corners of the parties' agreement." In particular, the Sixth Circuit explained that a court may modify the terms of a decree when it is "satisfied that the decree has been turned through changing circumstances into an instrument of wrong." *Ibid.* (citation and internal quotation marks omitted).

None of those decisions addresses the relevance of extrinsic evidence when the language of the decree unambiguously makes clear that a change was anticipated. Indeed, none of the cases involved the question whether a change was anticipated or unanticipated. There is therefore no conflict between those decisions and the decision below.

Review of the question whether extrinsic evidence may be considered when the decree unambiguously shows that a change was anticipated is also unwarranted because petitioner could not benefit from a rule allowing consideration of extrinsic evidence. As the court of appeals explained, the extrinsic evidence shows only that EPA informed petitioner that it did not have a current intent to use its CERCLA remedial authority outside

the Box. EPA never gave petitioner any assurances that it would not invoke such authority in the future. Pet. App. 19a-20a. Indeed, during negotiations, petitioner sought a commitment from EPA that it would not exercise CERCLA remedial authority outside the Box, the United States refused to provide that commitment, and no such commitment was included in the Decree. *Id.* at 27a. Because petitioner could not benefit from a ruling that allowed consideration of extrinsic evidence, this case is not an appropriate vehicle for resolving that issue.

3. Finally, petitioner contends (Pet. 21) that the court of appeals failed to properly apply the abuse of discretion standard in reviewing the district court's judgment. That contention is without merit and does not warrant review.

In reviewing the district court's decision, the court of appeals expressly invoked the abuse of discretion standard. Pet. App. 9a. Applying that standard, the court of appeals correctly concluded that the district court abused its discretion in granting the motion to modify. "A district court by definition abuses its discretion when it makes an error of law." *Koon* v. *United States*, 518 U.S. 81, 100 (1996). Here, the district court committed an error of law when it failed to resolve the question whether the parties anticipated that EPA might use its CERCLA authority outside the Box based on the unambiguous language in the Decree. It further erred as a matter of law when, as a result of that error, it failed to require petitioner to satisfy the heavy burden that applies when a party seeks a modification based on an anticipated circumstance. See *Rufo*, 502 U.S. at 385.

In any event, this is not a case in which the result turns on the standard of review. As discussed above, the

Decree clearly shows that the parties anticipated the possibility that EPA might use its CERCLA remedial authority outside the Box, and the extrinsic evidence does not indicate otherwise.

Petitioner contends (Pet. 21-23) that the court of appeals should have remanded the case to the district court to determine whether petitioner satisfied the heavy burden that applies when the party seeking a modification relies on an anticipated circumstance. Because the record permitted only one resolution of that issue, however, there was no need for the court of appeals to remand the case. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982). In seeking a modification, petitioner asserted that the financial impact of EPA's decision to invoke CERCLA authority outside the Box warranted a modification of the Decree. As the court of appeals explained, however, petitioner's allegations are speculative because it is unclear what liability petitioner faces compared to what it would have faced under the Basin Restoration Project. Pet. App. 22a. In any event, the question whether a remand was warranted is fact-bound and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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